

## COMMENTARY

The following Commentary section is based upon Professor Jerome McCristal Culp, Jr.'s piece, *Water Buffalo and Diversity: Naming Names and Reclaiming the Racial Discourse*. Professor Culp decries the continued entrenchment of white power, authority and advantage through the decisions, policies and attitudes of majoritarian institutions. He assails the media, the Supreme Court and legal academia as the brokers of this status quo. In response, Professors Mark Tushnet and Derrick Bell offer their support of Professor Culp. Professor Tushnet propounds a framework for the analysis and inclusion of African-American legal scholarship, while Professor Bell provides further compelling evidence of the magnitude of the dilemma Professor Culp has revealed. Finally, Professor Paul Carrington provides a brief criticism of some of Professor Culp's more specific assertions.

THE EDITORS



# WATER BUFFALO AND DIVERSITY: NAMING NAMES AND RECLAIMING THE RACIAL DISCOURSE

*Jerome McCristal Culp, Jr.\**

Clarence Thomas, second African-American appointed to the United States Supreme Court, to a largely white audience at Mercer Law School:

When I left Georgia over 25 years ago, the familiar sources of unkind treatment and incivility were the bigots. Today, ironically, a new brand of stereotypes and ad hominem assaults are surfacing across the nation's college campuses, in the national media, in Hollywood, and among the involuntarily ordained "cultural elite." And who are the targets? Those who dare to question current social and cultural gimmicks. Those who insist that we embrace the values that have worked and reject those that have failed us. Those who dare to disagree with the latest ideological fad . . . .<sup>1</sup>

Senator John Danforth, Republican of Missouri, after voting against the continuation of a federal patent for a group that incorporated the confederate flag as part of the design:

I was almost sick to my stomach. . . . When will it be that we don't have to prove our dedication to the cause of racial justice anymore?<sup>2</sup>

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\* Professor of Law, Duke University School of Law. I would like to thank Katharine Bartlett, Christopher Schroeder, James Coleman, and Linda Kirkland Culp for helpful comments. I suspect this would have been a more thoughtful Article if I had been willing to take all of their suggestions. My research assistant, Frank Cooper, provided invaluable help. Any remaining errors are, of course, my responsibility.

1. *The "New Intolerance,"* ST. PETERSBURG TIMES, May 30, 1993, at 5d (excerpts from Justice Clarence Thomas' speech at the Mercer University School of Law).

2. Jessica Lee, *Moseley-Braun's Dramatic Stand: Flag Fight Symbolizes Much More, USA*

Gwyneth Sheehan, wife of juror [in the first trial of Officers Koon, Powell, Briseo, and Wind for beating Rodney King] Charles Sheehan, a retired naval aviator described by another juror as adamant for acquittal . . . tried to *dispel that aura of racism cast on her husband by recalling that he put a black high school girl in command of this NROTC unit, over a white boy*. "My husband has nothing to be ashamed of," she said, "but some black man calls every time there's another death in the riots and says we're responsible for it."<sup>3</sup>

## I. INTRODUCTION

Racism<sup>4</sup> is either a thing of the past or the most important concern

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TODAY, July 23, 1993, at 4A.

3. Nina Bernstein, *Bitter Division in the Jury Room: How 12 Ordinary Citizens Met for 7 Days to Produce Verdict that Shook L.A.*, NEWSDAY, May 14, 1992, at 5.

4. The one thing I have learned from writing this Article over the last three years is how differently many black people and many white people experience and accordingly understand racism. To many white people, not being racist means having less racial animosity than their parents (something almost all can at least claim); having less racial animosity than someone they know (something all can claim); or not belonging to a white supremacist group. *See generally* John F. Dovidio & Samuel L. Gaertner, *Changes in the Expression and Assessment of Racial Prejudice*, in *OPENING DOORS: PERSPECTIVES ON RACE RELATIONS IN CONTEMPORARY AMERICA* 119 (Harry J. Knopke et al. eds., 1991). Racism is like the popular notion of France during the Nazi occupation. To many, France was a place where the French were either in the resistance or collaborating with the Nazis. For many white people, unless they believe overwhelmingly in the inferiority of black people, they are not collaborators with racism and are not racist. For many black people racism is not like that at all—it resists "either-or" distinctions. For many black people racism is a system of dealing with and controlling the lives of people of color. Almost everyone contributes to that system in big and little ways. So for many black people it is not hard to say that President Carter was seriously and importantly concerned about the interests of black people but that when he talked about racial purity during the 1976 Presidential Campaign he was being racist. *See* JULES WITCOVER, *MARATHON: THE PURSUIT OF THE PRESIDENCY 1972-1976* at 285, 302-08, 321 (1977). Similarly, I would include a black mother telling her children that "white was right" as being a racist act. Racism is experienced by many black people as a series of individual acts that are part of a larger system. To many white people the acts and the motives of those that are involved are all that encompasses racism. Notions of a racist system are simply products of an overactive imagination about the consequences of individual action. So when I use racism in this Article I mean to include any actions that help to subordinate black people and other people of color in the United States. Racism in this context is the result of notions of superiority and white supremacy held in various amounts by people of all colors in America and, unlike the Nazi-held France, the landscape includes more than simply collaborators and the resistance. Most people fall somewhere between total collaboration and total resistance to white supremacy.

Many white Americans want a kind of "get out of jail-free card" for their efforts over the years against racial oppression. I applaud those efforts when they are real, but I do not believe they require me to ignore the actions that indeed help to contribute to a racist system. People

alive in America, depending on whether you believe James Sleeper<sup>5</sup> or Derrick Bell.<sup>6</sup> Like Senator Danforth, many white Americans would like to say that enough has been done that there comes a point—to quote Justice Bradley 100 years ago—when blacks should stop being the “special favorites of the law,”<sup>7</sup> and, like Senator Danforth, many white Americans are sick and tired of having to deal with ending racial oppression. This view of the world has produced the reactions we see in the academy and the legal community in general to charges of racism and change for racial reasons. Senator Danforth worked to be sure that an African-American would replace Justice Thurgood Marshall, the only other black to serve on the Supreme Court, and Senator Danforth worked tirelessly, some have said indispensably,<sup>8</sup> for the passage of what became the 1991 Civil Rights Act. The claim that I believe Senator Danforth is making (and that others would make for him) when he asks how long he must deal with racism,<sup>9</sup> is that a person like him cannot be a racist and that racism does not exist among the people of

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who have participated actively in ending oppression do get points, and I would give them the benefit of the doubt in a situation where there is a question about whether their actions are racist, but many would like to have that benefit bestowed without any prior action to account for it. For many white Americans, to come to the realization that they may have participated in racism may create feelings of guilt. Certainly, part of the response to the history of racism is guilt, but as I will point out in my Conclusion that is not the object of this paper. Guilt is not a useful response to racism—action is. See Conclusion: Beyond Guilt, *infra* part V.

5. See generally JAMES SLEEPER, *THE CLOSEST OF STRANGERS: LIBERALISM AND THE POLITICS OF RACE IN NEW YORK* (1990).

6. See generally Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

7. The Civil Rights Cases, 109 U.S. 3 (1883) provide:

It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the quests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business . . . .

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.

*Id.* at 24-25.

8. See Reginald Govan, *Civil Rights: Rhetoric and Reality*, Address at civil rights conference (Apr. 14, 1993) (forthcoming article, transcript available at *Rutgers Law Review*).

9. Whenever I read Danforth's statement I can't help but hear Martin Luther King on the steps of the Alabama statehouse: “How long? Not long, because no lie can live forever. How long? Not long, because you still reap what you sow. How long? Not long. Because the arm of the moral universe is long but it bends toward justice.” Martin Luther King, Jr., *My People, Listen*, in *I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD* 124 (James M. Washington ed., 1992).

goodwill in America, who include most Americans. Racism and white supremacy are relegated in our time<sup>10</sup> to the David Dukes and the few white supremacists who overreact to the liberal injustices, the reverse discriminations, and the coddling of racial minorities.<sup>11</sup>

Like the only black justice on the Supreme Court, Clarence Thomas, many white Americans see the charge of racism or white supremacy as unfair and a new form of intolerance. Senator Danforth and many white Americans believe they have paid their dues for the racism that exists in American life. Indeed, it is hard not to find the confident assertion of racial sainthood by many white Americans. After all, they seem to be saying to themselves, we have accomplished in the United States, with minimal bloodshed and general agreement among the various groups, what the people of the former Soviet Union and Yugoslavia seem incapable of achieving. The United States, they propound, is a place where diversity truly is a valuable part of public policy.<sup>12</sup> This is true of people like my colleague Paul Carrington who cannot see any injustice ever done by American legal education toward black people and who want to prove that by pointing to the scattered efforts of law schools and law professors.<sup>13</sup> He would extend Senator Danforth's

10. Incredibly, my colleague has extended this argument to the past. See Paul D. Carrington, *The Role of Legal Education in the Opening of the Legal Profession Since 1776*, 44 FLA. L. REV. 501 (1992).

11. This view of the world is held by many people across the political spectrum. See generally ROBERT KAHLENBERG, *BROKEN CONTRACT: A MEMOIR OF HARVARD LAW SCHOOL* (1992).

12. See ARTHUR SCHLESINGER, *THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* 17 (1992). Schlesinger states:

The historic idea of a unifying American identity is now in peril . . . .

. . . . The militants of ethnicity now contend that a main objective of public education should be the protection, strengthening, celebration, and perpetuation of ethnic origins and identities. Separatism, however, nourishes prejudices, magnifies differences and stirs antagonisms. The consequent increase in ethnic and racial conflict lies behind the hullabaloo over "multiculturalism" and "political correctness," over the iniquities of the "Eurocentric" curriculum, and over the notion that history and literature should be taught not as intellectual disciplines but as therapies whose function is to raise minority self-esteem.

*Id.* Professor Schlesinger's point assumes that to celebrate a divergent path and history is to denigrate the common. I hear the proponents of multiculturalism as requiring people to understand that there is no single theme in our society and that it is important to hear the whole orchestra, not just part of the melody. Accordingly, the result will not be differences but understanding. Just as we study other cultures, we should study how our own is produced and replicates itself, including the good and the bad, the oppressive and the liberating. See generally Jerome McCristal Culp, Jr., *Diversity, Affirmative Action, and Multiculturalism: Duke, the NAS, and Apartheid*, 41 DEPAUL L. REV. 1141 (1992).

13. See Paul D. Carrington, *Diversity!*, 1992 UTAH L. REV. 1105 (1992). He writes:

view of the present to the past and argue that in terms of their times there was no discrimination against black people in American law schools. The truth is that racism and white supremacy still live in the interstitial activities of the law and in legal education, and if we cannot point out that fact, change is not possible. The argument for the new tolerance, against what is known as political correctness, and what my colleague Paul Carrington calls teaching in a time of moral excess,<sup>14</sup> is at best an argument for the racial status quo in American racial politics and American legal education. A majority of white Americans have returned to the historical view that the status quo is appropriate. For many black Americans and many other groups in society, such a view is more than simply wrong—it is a blueprint for a continuation of the subordination of black and other marginalized groups in American society.

Recently, I have offended some of my law school colleagues, several federal judges, and it seems a Supreme Court justice,<sup>15</sup> by raising the issue of racism and white supremacy in their work and indirectly in their histories. In this essay I want to defend my own efforts from charges of unfairness and academic showboatism and to encourage

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For the 1986-87 academic year there were 187 African-American law teachers in schools or other than those primarily serving African-American students—up from as few as 10 in 1965. These teachers constituted 1.2% of the African-American lawyers in America. By comparison, in 1989 there were approximately 3740 nonminority male law teachers constituting about 0.7% of the nonminority male lawyers . . . .

. . . . I can add to this data the personal attestation that since 1965 many hundreds of law teachers have signalled to me their support for these preferences, and only a mere handful have ever suggested possible skepticism about them.

*Id.* at 1126-27 (emphasis added).

I would suggest to Professor Carrington that he cannot have been attending the same faculty meetings I have at Duke Law School. There is more than a handful of opposition at his end of the faculty hall on every issue of affirmative action that has come up. There seems to be a slight majority for affirmative action in general on our faculty, but it is small. *See generally* Carl A. Auerbach, *The Silent Opposition of Professors and Graduate Students to Preferential Affirmative Action Programs: 1969 and 1975*, 72 MINN. L. REV. 1233 (1988) (despite opposition to affirmative action, it took place in American law schools because the opposition was not vocal enough). Support for affirmative action does not include all women. *See e.g.*, Suzanna Sherry, *The Forgotten Victims*, 63 U. COLO. L. REV. 375 (1992) (women are the real victims of oppression, not blacks).

14. Paul D. Carrington, *Accreditation and the AALS: The Boalt Affair*, 41 J. LEGAL EDUC. 363, 363 & n.1 (1991).

15. Sixty-two of Justice and Chief Justice Rehnquist's law clerks signed a letter attacking an article in the *Legal Times* describing two speeches I gave on the racial discourse of Justice Rehnquist. 62 *Former Clerks Reject "Outrageous Attack,"* LEGAL TIMES, March 15, 1993, at 45. *See also* Tony Mauro, *Courtside: Theory Sees Rehnquist as "White Supremacist,"* LEGAL TIMES, March 1, 1993, at 10.

others to call racism racism. I believe that the nature of racism is so powerful that if we refuse to note its presence, we empower its insidious influence on day to day decisions of all of us, particularly on our legal decisions. This is very evident in the discussion about the racism of the jurors of the first trial of Officers Briseno, Wind, Powell, and Koon for beating Rodney King. The jurors and their defenders, including liberal writers like Roger Parloff, have suggested that the facts, not race, were the determining factor in the jurors' decision to return with not guilty verdicts.<sup>16</sup> However, we see a disturbing pattern when we examine the actual attitudes of the jurors and their response to the evidence of racism before them. As in much of the current legal and nonlegal discourse, a majority of the jurors in the original trial and many commentators were able to discount the racism evident in the statements of Officer Powell and the attitudes of the other officers. When Judge Davies reduced the possible sentences of Koon and Powell because they were good citizens and because Rodney King brought the beating on himself, Judge Davies endorsed the view that racism and race played no part in this action.<sup>17</sup> This was particularly true when

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16. See generally Roger Parloff, *Maybe the Jury Was Right*, AM. LAW., June 1992, at 7 (jury came to the right decision based upon the evidence presented); Steven Brill, *In Praise of Justice in Simi Valley*, AM. LAW., June 1992, at 5 (a jury verdict for these defendants proves how really majestic and great the American jury and legal system is; if justice can be found for these defendants, then it means that the government is not too powerful).

17. Judge Davies, in reducing the possible ten year sentence and not imposing any fines on these officers, wrote:

*The present case is atypical in several respects. First, Mr. King's wrongful conduct contributed significantly to provoking the offense behavior. Consequently, though the offense of which defendants Koon and Powell were convicted falls within the language of the Guidelines, Koon's and Powell's underlying conduct falls outside the range of more typical offenses for which the Guidelines were designed.*

Second, defendants Koon and Powell have already sustained, and will continue to incur, punishment in addition to the sentence imposed by this Court . . . .

Third, while the offense of conviction involves a serious assault, there is no evidence, and the government does not argue, that Koon and Powell are dangerous or likely to commit crimes in the future.

Fourth, defendants Koon and Powell were indicted for their respective roles in beating Mr. King only after a state court jury acquitted them of charges based on the same underlying conduct. Under these circumstances, the successive state and federal prosecutions, though legal, raise a specter of unfairness . . . .

Each of the first and second factors, as well as the third and fourth factors in combination, constitute "mitigating circumstances," not adequately considered by the Commission in formulating the Guidelines. Based on these unique circumstances, a sentence outside the prescribed Guideline range is appropriate for both defendants Koon and Powell.

In reducing Mr. Koon's and Mr. Powell's sentence below the prescribed Guide-



the judge ignored the racism that surrounded the actions before, during, and after the attack on Rodney King.<sup>18</sup> The reason for this approach to the evidence is also easy to understand. If the words or the actions of Officers Powell or Koon were given credence, then other words spoken by these jurors or their friends and acquaintances would also matter. The only way that we have been able to be blind to racial concerns is by denying the importance and power of their existence. We do this for jurors who cannot see the racism of some police actions, for police officers who cannot acknowledge the racism inherent in their activity on the streets, for judges who cannot admit the notion of racism into their activity on the bench, and for law students and law professors who incorporate racism into their activities but deny the presence of that incorporation. However, it seems wrong for us to ignore the racism in the above-quoted passages. There is also racism in the words and actions of Officers Powell and Koon, and the failure of a majority of the

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lines' range, the Court finds, and considers as a mitigating circumstance, *that Mr. King's wrongful conduct contributed significantly to provoking the offense behavior.*

*Excerpts: L.A. Police Sentences Explained*, NAT'L L.J., August 16, 1993, at 18 (emphasis added) (citations omitted) (excerpt from sentencing memoranda). I tend to agree with those who find our current efforts to incarcerate everyone through mandatory sentences to be too onerous and burdensome. However, there is an added insult-to-injury quality to the court's views that somehow Rodney King brought this beating upon himself. This is particularly true when as here the defendants are unrepentant. *But see* Patrick Buchanan, *L.A. Law: Koon Punished For One Bad Call*, ARIZ. REPUBLIC, August 10, 1993, at A11 (Koon, a good cop, is being punished while Rodney King becomes a millionaire); William F. Buckley, Jr., *Fear of Racial Discrimination Translates Into Injustice for Two*, ARIZ. REPUBLIC, September 2, 1993 at A23 ("For a change, the victims of such injustices are white: two former officers of the Los Angeles Police Department, one of whom had 100 commendations for exemplary conduct—until his path crossed that of Rodney King [were sentenced to 2 1/2 years] . . . So? The idiots in Washington, specifically Solicitor General Drew Days, reacting to outraged cries by members of the black community who hoped to see the two officers electrocuted or gassed, announce that the government will appeal the sentence as being too lenient. Thirty-six months in prison, a lost career, public infamy, penury from legal defense bills, is too light a sentence for the mistreaters of Rodney King . . .").

18. The officers never suggested that they felt any remorse and wrote of previous racial actions they had engaged in. Officer Koon's book, written after the first trial, spoke of the "Mandingo" actions of Rodney King toward the female highway patrol officer. In addition, the statements on the police radio about the "gorillas in the mist" and the statements at the hospital were discounted. No doubt Judge Davies would tell us this is all good humor and that those who are sensitive to the racism here are bringing that on themselves also. This too echoes Justice Brown's comments in *Plessy v. Ferguson*:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. *If this be so, it is not by reason anything found in the act, but solely because the colored race chooses to put that construction upon it.*

*Plessy*, 163 U.S. 537, 551 (1896) (emphasis added).

original jury to acknowledge that racism is a form of racism as well. The strongly held belief of these jurors and of other participants in the legal process that they are not racist as they perpetuate racism is an extremely powerful form of protecting white supremacy in American society.

The juror's wife's explanation that her husband is not a racist, because he once promoted a black girl over a white boy, is an example of this racial hope. The wife's point is that her husband is not everywhere a racist. This means in our world that he cannot *be* a racist. He has become a nonracist by a single action.<sup>19</sup> It is easy to see that this should not be enough, but such responses are in fact typical of the world view of the white "nonracist." This is a demand by the juror's wife to be able to control the manner in which her husband will be portrayed. She also attempts to see him as the primary victim of oppression because black people will not admit the truth of her and her husband's nonracism, as shown by some black person who continues to call and remind them of her husband's participation in reinforcing racial oppression. According to this view, the calls in the middle of the night to this juror after every death in the riots that followed the verdict are impolite in their failure to acknowledge the power of the transformative potential of white people.

In addition, I want to point out how our failure to look racism in its face in our teaching, legal commentaries, and legal practice silences the important voices of scholars of color in the academy, students on our campuses, and people in everyday life. Indeed, majority scholars have engaged in a series of strategies to keep control of the discourse by silencing black voices and grandfathering the power of this entrenched majority.

These efforts are armed by a belief in three strategies. Many majority scholars and many white Americans in their interactions with Afri-

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19. This is Patrick Buchanan's point about Sergeant Koon:

As other officers stood back aghast, (Stacey) Koon dropped to his knees and administered mouth-to-mouth resuscitation in a futile effort to save the man. An autopsy revealed what officers had feared - the dying prostitute had AIDS.

Koon, father of five kids, risked his life to save a dying black prostitute. Why? Because, said Koon, that man was "made in the image and likeness of God." And if Stacey Koon could keep him alive he was going to do it.

This is the police sergeant now on his way to prison, for two and a half years, for violating the civil rights of Rodney King.

Buchanan, *supra* note 17.

can-Americans adhere to the master view of interactions with black people. Just as they were during the antebellum period in the South and other parts of the country, white people must be the masters, and black people must be subservient in thought and action. These scholars, like many white Americans, insist on being in control of their relations with black people. We see this in scholarship which makes the words of black people irrelevant.<sup>20</sup> When majority scholars are in master mode they cannot hear the words of scholars of color; hence, they are in control of the discourse.<sup>21</sup>

The second strategy of response is the corollary to this master strategy and, like the master strategy, goes back to the very beginning of American legal discourse. This strategy is to claim that any diminution in the absolute control of the legal and economic discourse by the majority scholars is an effort to make of white people what black people are.<sup>22</sup> In antebellum America this was seen in the almost religious fear of being made a slave.<sup>23</sup> In contemporary America it is seen in the beliefs that attempts by black students and faculty to be heard on campus has made "niggers" of white students and faculty, and that white males who do not get jobs are the objects of "reverse discrimination."<sup>24</sup>

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20. See generally Jerome McCristal Culp, Jr., *Posner on Duncan Kennedy and Racial Difference: White Authority in the Legal Academy*, 41 DUKE L.J. 1095 (1992). Judge Posner cannot tell that scholars of color cannot add anything unique to the legal discourse without reading any of our work. This is reminiscent of the legal requirement that slaves could not testify against nonslaves. *Id.* at 1106-07.

21. See generally Jerome McCristal Culp, Jr., *You Can Take Them to Water But You Can't Make Them Drink: Black Legal Scholarship and White Legal Scholars*, 1992 U. ILL. L. REV. 1021. See also Richard Delgado, *A Comment on Aleinikoff*, 63 U. COLO. L. REV. 383 (1992).

22. See discussion *infra* parts II and III.

23. The male equivalent of this seems to be the frequent heterosexual fear that the acceptance of homosexuals with power over their lives will make of males the kind of sexual objects that they often make of women. I say this partially because the publicly expressed fear of the military involves homosexuals sharing showers with nonhomosexuals; in fact, the military has made it a silent policy to persecute women for being lesbians while tolerating male homosexuals more easily. The Tailhook scandal where the pilot-elite of the Navy purportedly engaged in attacks on women, and the complaints from women that they have to succumb to sexual advances or be branded lesbians, are examples of this trend. See generally RANDY SHILTS, *CONDUCT UNBECOMING: GAYS AND LESBIANS IN THE U.S. MILITARY—VIETNAM TO THE PERSIAN GULF* (1992).

24. The claims of the tenured Professors Thermstrom at Harvard and Gini at the Loyola University of Chicago decrying student complaints about their "racist" actions are an example of this attitude. See NAT HENTOFF, *FREE SPEECH FOR ME BUT NOT FOR THEE: HOW THE AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER* 157-58 (1992) (discussing the situation of Professor Gini); Sally Jacobs, *The Put-Upon Privileged Ones; Feeling Wounded, White Men Complain Society Stereotypes Them as Boring Jerks*, BOSTON GLOBE, November 22, 1992, at 1 (discussing Thermstrom situation). See also Culp, *supra* note 12, at 1167-69 (pointing out

The final strategy has been to disclaim the existence of any current discrimination. This strategy also is as old as the republic. Its most forceful and successful explication was pronounced by Justice Bradley in *The Civil Rights Cases*, where he denied the continued existence of discrimination just as the compromise of 1877 was leaving black people with no legal and little moral protection (a compromise that Bradley, as an independent agent on the Election Commission of 1876, helped to formulate).<sup>25</sup> The concerted effort to portray black people as "whiners" or professional victims when they point out the continued social and political inequality in American is the current incarnation of this view.<sup>26</sup> This strategy limits the ability of black people to point out the inadequacy of the current legal structure.

All of these strategies are ways of enforcing the racial status quo in this country, and all have been adopted by the current Supreme Court and much of the liberal establishment in the legal academy.<sup>27</sup> The first

that Hentoff's story about Gini leaves out the story of the black student involved in that incident).

To see how pervasive this response is, one only has to look in vain for the white male who has been told that such fears of reverse discrimination are all in his mind, and that if he did not see himself as a victim he would not be experiencing these problems.

25. Some commentators defend the Court's decision as being moderate in effect, contending that the Court assumed that the individuals' rights would be vindicated at the state level. However, the whole purpose behind the passage of the Thirteenth and Fourteenth Amendments was that such faith was misplaced. The Court, by engaging in this presumption, indulges in a myth that one can fairly believe it knew to be a lie. See, e.g., HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875* (1982); Arthur Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387 (1967). But see Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39 (contending that Justice Bradley's decision implies a constitutional right of access to certain public accommodations); Alan R. Madry, *State Action and the Obligation of the States to Prevent Private Harm: The Rehnquist Transformation and the Betrayal of Fundamental Commitments*, 65 S. CAL. L. REV. 781 (1992) (arguing that Justice Bradley's decision in *The Civil Rights Cases* finds a state obligation to protect the interests of freed blacks); Earl M. Maltz, *The Civil Rights Act and the Civil Rights Cases: Congress, Court, and Constitution*, 44 FLA. L. REV. 605 (1992) (arguing that the Court adopted a middle position in *The Civil Rights Cases* that is plausible if not inevitable).

26. See generally SLEEPER, *supra* note 5; STANLEY CROUCH, *NOTES OF A HANGING JUDGE: ESSAYS AND REVIEWS, 1979-1989* (1990); LINDA CHAVEZ, *OUT OF THE BARRIO: TOWARD A NEW POLITICS OF HISPANIC ASSIMILATION* (1991). But see Michael A. Olivas, *Torching Zozobra: The Problem with Linda Chavez*, in RECONSTRUCTION 48 (D. Kennedy ed., 1993). See also the often silly reviews of Derrick Bell's important and powerful book, *FACES AT THE BOTTOM OF THE WELL*, *supra* note 6. As someone said about this book, many majority scholars who think about race have come to describe it as "that book." Peggy Davis, Speech at New York University School of Law during black student program entitled Reconceptualizing Race: Collective Identity and Civil Rights Advocacy in the "New Democratic" Politics (Apr. 16, 1993).

27. Gerry Spann has made the point in his wonderful book on the Constitution and race that

strategy of demanding to be the master maintains the status quo by testing the appropriateness of every action by black scholars and litigants against a standard of subservience. It is impossible to break the racial status quo if the master strategy is permitted to prevail. The second strategy of claiming to have been made subjects of discrimination helps to enforce the status quo by reducing any argument for change into a reverse argument about the diminution in the majority's power. It means that whenever we begin to discuss racial issues, we switch and talk instead about injuries to white Americans. The third strategy of denying the existence of racism helps to enforce the racial status quo by silencing those who speak out and claiming that their voices are shrill and out of sync with appropriate responses.

To see the application of these strategies in current issues, I will examine three situations which implicate race and racism. The first centers around the issue of when someone may call an action racist or white supremacist while remaining civil and maintaining a civil discussion. This is an important concern in the context of contemporary discourse because many majority scholars believe that most conscious racism has been eradicated with their help. I will begin by examining the example of the situation at the University of Pennsylvania where black women were called racist names and "water buffaloes," and will then discuss two occasions when I have indicated that Judge Posner has stepped over the line in his scholarship.

Secondly, I will examine the efforts of David Duke and their analogue in the discourse of the Supreme Court. David Duke's presence may have so tainted an argument made by many in the political right that it led to the defeat of President Bush, but the tenets of what he stood for are increasingly becoming the law of the land. This is most obvious in the Supreme Court's opinions in *Shaw v. Reno*<sup>28</sup> and *St. Mary's Honor Center v. Hicks*.<sup>29</sup> All three strategies have been utilized by the proponents of "white" justice in redistricting. This effort is part of a larger plan to force white supremacy out of the legal discussion. The silencing of Lani Guinier is another example of that trend, and the alteration in tenure and hiring policies at many law schools, just as scholars of color are becoming eligible for tenure, is a similar trend.<sup>30</sup>

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this is the best that we can expect from the Court. See GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 85-118 (1993).

28. 61 U.S.L.W. 4818 (1993).

29. 113 S. Ct. 2742 (1993).

30. See Patricia J. Williams, *Lani, We Hardly Knew Ye*, VILLAGE VOICE, June 15, 1993, at

The third situation examined will be a set of articles written by Paul Carrington, a member of the Duke faculty and former dean, on diversity. In these articles, diversity concerns have been transformed into the ultimate threat to intellectual and institutional integrity. Again, all three strategies have been utilized by Professor Carrington and by the Supreme Court in its discussion of diversity. I will end by addressing the dangers of crying racism in a world where race matters and white supremacy are still dominant themes of social discourse.

## II. WATER BUFFALO, WHITE SUPREMACY, AND JUDGE POSNER

My oldest brother attended an Ivy League institution. A story about his institution came immediately to mind when I read about the incident of the black sorority sisters accosted with racial epithets at the University of Pennsylvania.<sup>31</sup> When my brother attended this Ivy League university in the 1970s, selection procedures for choosing dormitory housing provided that if any member of a housing group was returning, that person could select the other students to share the dormitory room.<sup>32</sup> Many housing groups would room underclassmen with returning upperclassmen to keep choice housing units among friends—particularly athletic teams and other social groups. This procedure seems neutral, but it meant that certain groups of individuals could and did perpetuate their claim to a room over a long period of time. It is not surprising that these procedures were not class or race neutral in effect. Through good luck, while my brother was there, a group of black students was able to secure rooms in one of the most desirable campus dormitories. These black students almost immediately had a loud and late party. After a short time, a member of this group was called to a dean's office and asked to explain their discordant behavior. The student admitted that they had been boisterous and a little out of control and agreed to alter their behavior, but asked about the rugby team housed in the same dormitory who also had loud and late night parties, and who often urinated out of the window on unsuspecting passers-by. The dean paused and said that their behavior was

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31. I remember this story very clearly, but the person who told it to me cannot remember doing so. It is, however, indicative of the kinds of things I have heard at every institution of higher learning where I have worked.

32. As an interesting aside, it is important to note housing's power to shape policy. When this Ivy League institution decided to desegregate itself in the 1950s, it admitted the older brother of a friend of mine partially because he could live at home and not in one of these dormitories on campus.

"tradition." Ever since I heard that story, I have understood why black students have had such a difficult time finding a place in elite educational institutions. We are not, were not, and may never be "tradition" if current trends continue on these campuses.

Several months ago, some black sorority members at the University of Pennsylvania were returning to their dormitory late at night, making a lot of noise. This prompted a number of students to yell "keep quiet" and some number to shout racial epithets. One young man, an Israeli exchange student who speaks fluent Hebrew, called these women "water buffaloes" and suggested that there was a zoo nearby. When the women complained about the racial slurs, none of the students responsible came forward except for the young man who had called them "water buffaloes" and suggested that they go to the zoo. He claimed that he had simply translated into English a Hebrew term that means "offensive person," and that he was not racist. The women initially attempted to use the university grievance procedures that control student interactions, but after this affair became the subject of much editorial and other comment, the students dropped their complaints because they felt that their claims could not be fairly heard.

At the University of Pennsylvania, white students are now free to call black women "water buffalo" and to tell them to go to the zoo. These are words that in my neighborhood—certainly when surrounded by racial epithets—would have been thought racist. But the white student's claim that he is not a racist is the claim made by the vast majority of white Americans in any of their interactions with black America. We are not racist when we call you names. You are too sensitive to sophomoric humor, they say. Join in the humor directed at you by these clever young people, they suggest.<sup>33</sup> I found that my

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33. See PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 110-12 (1991). Williams describes:

On the night of September 29, 1988, a white student identified only as "Fred" and a black student called "Q.C." had an argument about whether the composer Beethoven had black blood. Q.C. insisted that he did; Fred thought the very idea "preposterous."

The following night, the white students said that they got drunk and decided to color a poster of Beethoven to represent a black stereotype. They posted it outside the room of Q.C. . . .

Later on October 14, after the defacing, but before the culprits had been identified, a black fraternity's poster hanging in the dorm was emblazoned with the word "niggers." No one has admitted to that act, which prompted an emergency house staff meeting that eventually led to the identification [of Fred as one] of the students who had defaced the Beethoven poster.

. . . There were three things about Fred's explanation that I found particularly

own patience for such sophomoric behavior evaporated when I was accused in a local campus right-wing publication of being a "water boy" and "spear carrier" for Stanley Fish.<sup>34</sup> It is clear that people have not read what Stanley Fish and I wrote if they believe that I am simply parroting what he believes, but of course that was not the purpose of the comment. To call a black person a "water boy" and "spear carrier" is pure racist commentary, and since the person who wrote it about me did so anonymously, she does not have to face her antagonist, just as the University of Pennsylvania students who yelled anonymous racial epithets out the window were not disciplined.<sup>35</sup> They did not risk being confronted with their racism, and that seems to be the heart of the rationale for not allowing anyone to call you a racist. People would like to be able to control how black people are perceived, but they want to do so costlessly. Don't worry, be happy, they say to black people in the academy.

My Harvard Law School classmate and friend who is black must have similar feelings about a *New Republic* article that questioned whether he or the student editors of the *Harvard Law Review* wrote his tenure article. The *New Republic* article, entitled *Hate Story*, investi-

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interesting to report:

. . . (2) Fred is a descendant of German Jews and was schooled in England. He described incidents that he called "teasing"—I would call them humiliation, even torture—by his schoolmates about his being Jewish. They called him miserly, and his being a Jew was referred to as a weakness. Fred said that he learned not to mind it and indicated that the poster defacement . . . had been in the spirit of this teaching. He wondered why the black students couldn't respond to it in the spirit in which it was meant: "nothing serious," just "humor as a release." It was a little message, he said, to stop all this divisive black stuff and be human. Fred appeared to me to be someone who was humiliated into conformity and then, in the spirit of the callousness and displaced pain that humiliation ultimately engenders, was passing it on.

*Id.* (citations omitted).

34. *Hall Nominations I*, DUKE REV., May 1993, at 3 (letter to the editor from anonymous law student nominating Jerome Culp to the "Hall of Shame").

35. It is easy to claim that my criticism of these words of description somehow requires that I, a black professor, be free of criticism. As I have indicated in other places in this Article, I believe the opposite. I have never failed to publicly or privately debate an issue on this campus when I have been invited to do so, and I belong to a faculty where the members often have failed to be willing to do so. (I do not think my colleagues are alone in this failure, and I do not mean to suggest that only one faculty is subject to this failing.) Students certainly have the right to make fun of me, and in many ways I am a character who has many qualities that can be made fun of, but I do reserve the right to criticize humor that is racist or oppressive. If people think when I argue for the importance of race sensitive remedies that I am wrong, or foolish, or that I am afraid to face the hard truths, I find that a useful debate. When people want to resort to racial short-hand to control my views, I am not sympathetic, and I will call such actions racist.



gated a rumor going around Harvard Law School that he had simply provided the editors of the *Law Review* with an outline that the student editors fleshed out. This libelous story was proven wrong when a half dozen people noted that they had read and commented upon a 265 page draft of his article. The editors of *The New Republic* concluded that this rumor was false, but printed their piece "to illustrate the breakdown of race relations on many campuses that can lead to such events; and to probe the undercurrent of affirmative action that clearly contributed to the balkanized atmosphere."<sup>36</sup> How exactly affirmative action and balkanization fit together is not made clear in the article or in the editors' response to it. Perhaps what the editors of the *New Republic* mean is that if there were fewer persons of color around because there was no affirmative action, then this conflict would not exist. This is certainly correct, but it assumes away a problem by attributing to the small changes produced by affirmative action all of the conflicts in the legal academy. There is embedded in the notion that the *New Republic* would print this scurrilous story about a black law professor, the belief that he does not have any rights and that his story belongs to the real Harvard Law School—the people who created and circulated this rumor. It is an effort to make the victim of white supremacy somehow the cause of the problem of racism. The assumption that an eminent lawyer and important contributor to the law school community could not have written an article because he is black, in my view, can only be attributed to racism. I suspect that the racism of those who would make this assumption would also cause them to have difficulty with any black candidate for appointment to "Harvard's faculty." Such beliefs support the racial status quo and impose tremendous burdens on the people caught up in the carnage that is produced.

For a little while in the 1980s, I shared an apartment with a friend in West Philadelphia near the University of Pennsylvania, and I had been an assistant senior tutor and resident tutor during much of the 1970s at Harvard College. A number of racial incidents, big and small, happened to me at Harvard and near the University of Pennsylvania. Some students had crosses burned outside their rooms, and someone wrote "nigger lover" on my door over what they must have decided was an offensive newspaper column protesting racial discrimination, which I had posted on the door.<sup>37</sup>

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36. *Slanderous*, NEW REPUBLIC, Aug. 2, 1993, at 4 (emphasis added) (editor's reply to letter of Charles Nesson of Harvard Law School).

37. I have never known whether the perpetrators of this incident were aware that I am black

Black students have found that white students and administrators at Ivy League institutions treat their actions as nontraditional and offensive even when the behavior is just like that of white students. Certainly, my experience as a resident tutor and assistant senior tutor in one Harvard undergraduate House for a significant part of the 1970s does not support the notion that black students are somehow the "special favorites" of Harvard or of any other Ivy League institution. The story of the encounter between those black women members of the University of Pennsylvania community and the white students suggests somehow that the black students did not belong where they were and that their actions were outside the bounds of acceptable student behavior. There is an echo in some descriptions of the problem that the University of Pennsylvania does not belong to these women either. Is it true that at the University of Pennsylvania, black students are the most raucous or cause the most trouble? I have seen no evidence to support such a view, but it is implicitly assumed by many who criticize the actions of these black women. The truth, at least as I have experienced or observed it, is that black students are tolerated in some ways on our campuses and experience the need to be more careful than white students. They are not "tradition" at Penn or at the other exclusive places for the well educated.

The difficulty when you are not "tradition" is that the strategies of racial subordination will be used to silence and limit the debate. We see this in the words and actions of the student who called these women water buffaloes and told them to go to the nearby zoo. The claim that this student's comment was part of the racial subordination of black women was "pooh poohed" as "political correctness" by knowing columnists.<sup>38</sup> Some claimed that the incident was further evidence of how far the discussion has sunk on our college campuses. A student cannot even try to study, they said, without being interrupted by offensive black women.<sup>39</sup> His statement that the women should go to the

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or simply assumed that as a Harvard tutor and graduate student, I must be white.

38. See Art Buchwald, *Which Animals Are Politically Correct And Which Ones Aren't?*, BUFFALO NEWS, June 6, 1993, at 11. Buchwald stated:

The question this raised was, which animals are politically correct and which ones aren't?

Rick Hornbeck of the National Zoo in Washington is a renowned expert on the subject, and it's his job to advise people on animal slander. Before insulting someone, all a person has to do is check it out with Rick.

*Id.*

zoo was not discussed in these commentaries, and the echo of racial epithets surrounding the "water buffalo" insult was ignored. Having had a number of multilingual friends, I am sensitive to the claim that one is speaking in one language but thinking in another. However, doesn't the speaker bear responsibility for how the statement comes out in English when it is spoken in English? In context, it is possible that this statement was in fact meant to be nonracial, but is it quite possible that one could not mistake the racial nature of the statement? The editorial drumbeat that forced these black women to drop their charges prevented an investigation of that question. This student was a nonracist by self-definition. He was able to decide how his statement would be considered, and the context of his words to the women involved were virtually ignored.

Embedded in this claim is the right of white people to characterize black people. If they are white people of goodwill, their position is that whatever is said should be interpreted in light of their goodwill. By refusing to engage in a debate they become the masters of the discussion, and it is impossible for them to sin.<sup>40</sup> This is what many white

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39. *Crossfire* (CNN television broadcast, May 17, 1993) (transcript # 834, on file with *Connecticut Law Review*) (comments of Patrick Buchanan, Michael Kinsley and Ruth Sidel).

BUCHANAN: Suppose they had been white? Would that have been all right?

Prof. SIDEL: I think he would have said something else. I think there is no question in mind that he would have said some very different words-

BUCHANAN: Suppose he called them a bunch of-

Prof. SIDEL: -if they had been white or if they had been males.

BUCHANAN: -mares or something like that, M-A-R-E-S? So what if he yelled the name out of his dorm when he's studying at night and they're raising hell down there beneath his dorm window, and he cuts loose with a comment. Why should this guy be called up by the commisars of the University of Pennsylvania?

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KINSLEY: Well, Pat, apparently the term water buffalo is a translation of a term in Hebrew that is a mild insult and not racial in any way. The kid is an Orthodox Jew.

BUCHANAN: He's got a good lawyer, too.

KINSLEY: He's going to get off. He should get off. It's no big deal.

BUCHANAN: All right. He should get off. What should happen is those girls, sorority girls should apologize-

KINSLEY: Women.

*Id.*

40. This will not leave white people without options when they speak. Some things said by white people will occasionally be treated as unfair when they are not, but they are more likely to learn what black students are thinking. So, for example, if a black student thinks that the use of the term "colored" is meant to be offensive, a white person (or black person) who used it could defend its use in a historical context. I wish that the fear of white professors that black students are too sensitive were an accurate description of the current situation in academic circles. My experience suggests the opposite is true and that too much is permitted to take

professors demand when they make racist remarks or take actions that some may find offensive. They refuse to engage in effective dialogue. They insist that their record speaks for itself.<sup>41</sup> When Al Gini calls a black woman "nigger," he demands the right to have that epithet seen only through his eyes. He is not a racist, he claims. He should not have to account to some independent body simply because some African-American woman misunderstands his words in class.<sup>42</sup> When Stephan Thernstrom is accused by black students of being insensitive to black concerns in his history course, he says he is the victim.<sup>43</sup> No one can investigate Stephan Thernstrom because he is a liberal, and he is "all right" on the race question. Indeed, if you listen to the liberal establishment, the greatest danger to liberty in the academy is the threat from persons of color claiming racial or gender discrimination.<sup>44</sup> White

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place without challenge by students. See e.g., Kimberle Crenshaw, *Foreword: Towards a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1 (1988-89). Though I disagree with much that Nat Hentoff has written on this point, I think he would agree with me. See HENTOFF, *supra* note 24.

41. This response is so classic that even basketball coaches resort to it. When Bobby Knight struck one of his black players with a bullwhip on the backside, he defended his action from charges of racism and insensitivity:

[Knight] was pictured in Thursday's *Albuquerque Journal* brandishing a whip and taking a playful swipe at forward Calbert Cheaney—who had his shorts pulled down. Local NAACP officials took exception, calling the photo racially offensive.

They demanded an apology. Knight's response after his team's win against UCLA: "Don't bother me with that . . . What I should apologize for is, I think, 18 black kids having played four years for me, with 15 of them having degrees.

"I recruited the first black kid to ever play at West Point. Those are the things I guess I need to apologize for."

In short, no apology is forthcoming.

Michael Hurd, *Knight Whips Up Trouble With a Prank at Practice*, USA TODAY, Mar. 30, 1992, at 4C. It turns out that Knight may have exaggerated his own success. See Murray Sperber, *College Sports Inc.: The Athletics Department v. The University* xi (paperback ed. 1991) (in the 1980s, Knight's Indiana teams have graduated only 42 percent of all of their players and only 11 percent of their black players).

Indeed, even American presidents are not immune to this tendency to overstate their actions in support of antidiscrimination. President Carter in the 1976 campaign claimed, as part of his response to the ethnic purity statement discussed *supra*, that he had introduced broad legislation for open housing when he had not. See WITCOVER, *supra* note 4, at 303 & n.5.

42. See HENTOFF, *supra* note 24, at 157-58.

43. See Jacobs, *supra* note 24. She writes:

Stephan Thernstrom, a Harvard University history professor, believes that he was stereotyped in a similar way. Four years ago, Thernstrom was publicly criticized by several black students for being racially insensitive in his teaching of a course on the history of ethnic groups. They charged that he had read from a slaveowner's journal and painted a benevolent picture of slavery.

*Id.* at 21.

44. One gets a flavor of this effort to make the white male the victim in efforts to make a

males no longer are free to use black people as pawns in their game, and they have been silenced.

A similar incident happened when Timothy Maguire abused his access to confidential data as a student employee and publicly discussed information regarding the applicant pool of black students at Georgetown Law School. Lino Graglia describes the criticism of that action by black students as the "ultimate act of political incorrectness."<sup>45</sup> Indeed, Graglia seems to think it was wrong for Mr. Maguire to have been reprimanded by the university for the disclosure of the data.<sup>46</sup> What would Graglia have said if a black student had stolen the grades of, say, Albanian students at Georgetown and said that Albanian professors gave preference to Albanian students, or if a black student had stolen the admissions records of a white student and publicized a white student's scores who had been admitted because his/her family was wealthy or connected? Someone would have certainly pointed out that such disclosures risks violating the Buckley (Jim, not William) Amendment.<sup>47</sup> Would such a student be punished? I think so, and it would be proper.<sup>48</sup> However, Graglia and the Tim Maguires of the

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"federal" case out of this dispute. See Ruth Shalit, *Buffaloed*, NEW REPUBLIC, August 2, 1993, at 18 (Eden Jacobowitz, the University of Pennsylvania student who admitted to using the term "water buffaloes," was taken to Capitol Hill. There, he was shown as evidence of the victimization of white males in general by a rightwing political group opposed to the nomination of Sheldon Hackney, president of the University of Pennsylvania during the "water buffalo" incident, as head of the National Endowment for the Humanities.)

45. Lino A. Graglia, *Race Norming in Law School Admissions*, 42 J. LEG. EDUC. 97, 97 (1992).

46. *Id.* at 98.

47. Family Education and Privacy Rights Act (Buckley Amendment to the General Education Provisions Act), 20 U.S.C. § 1232g (1982).

48. Nat Hentoff raises a different issue about this controversy, defending the right of the student publishers to keep their jobs after this article was published. In addition, he argues that not discussing the issues that Timothy Maguire raised would in the long run injure black people. See HENTOFF, *supra* note 24, at 224-29. Both of Hentoff's arguments seem to me to miss the point. Who gets to decide what is published in any newspaper? It is not given from on high. Did Timothy Maguire's article based on pseudoscience deserve such a printing? Should the black students who can see themselves as partial owners of that newspaper be able to complain about that lack of substance? To me, the argument about this article is like the argument over whether newspapers have a duty to print articles by people claiming that the Holocaust never occurred. Both issues involve whether someone has met minimal standards of scientific accuracy in making claims. This does not mean that the issue cannot be discussed, or letters printed that disagree with the article. Nonetheless, to print every statement is not possible, and some judgment about content is required by every newspaper. Similarly, the notion that this pseudoscientific use of data amounted to a debate was wrong. To ask black students to confirm their status every quarter or month may not seem a burden to Nat Hentoff. It can be to black students. See generally Crenshaw, *supra* note 40 (discussing the challenges faced by black students). Hentoff's

world believe that law schools belong to them. Black students are not tradition, and, therefore, their records are the property of any white student who chooses to break into the records to use the data. In a law school with few black students one might have thought such claims of ownership died with the passage of the Thirteenth Amendment.

The notion that the information was properly discussed is even more ludicrous when it becomes clear that Mr. Maguire was talking about the scores of students who applied, and not those admitted. In terms of scientific accuracy and discussion this is reminiscent of the "scientific" studies of the size of people's heads which proved that black people had smaller heads and therefore were less intelligent.<sup>49</sup> He had no information on the students admitted, and indeed only a sample of the students who applied to Georgetown, but if black people are in law schools only at the sufferance of the white majority, such scientific trivialities are unimportant. These arguments assume somehow that every black student has to justify his or her place in our law schools. This is not an assumption we make about any other group at our law schools. To make Tim Maguire the victim is to shift the focus from the transgressed to the transgressor. It would seem that Maguire has no right to claim the status of victim of anything and that the black students who were the object of Mr. Maguire's attention have been injured. The difficulty in discussing that injury shows how pervasive these strategies to silence and control black people are, and how powerful the fear of not controlling the debate about race is to many white Americans.

In an essay published in the *Duke Law Journal*, I take Judge Richard Posner to task for making statements about the scholarship of scholars of color without having read or considered any of it.<sup>50</sup> Indeed, Judge Posner suggested, without having read the work involved, that it was not possible for scholars of color to make unique contributions because of their experiences, since they do not all have the same experience.<sup>51</sup> "Not all black people are culturally black,"<sup>52</sup> is how he de-

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arguments appear to say that response is always possible. Where should the black women who were called water buffaloes have gone when these comments were made? The comments were not meant to be reasoned dialogue, and for people, particularly women, there is real danger — a danger that Nat Hentoff, unfortunately, cannot see.

49. See STEPHEN J. GOULD, *THE MISMEASURE OF MAN* 73-112 (1981) (discussing Paul Broca's research on craniometry).

50. See Culp, *supra* note 20, at 1095.

51. Posner writes:

There is room for suspicion that people are being excluded for discriminatory reasons

scribed the issue. When majority scholars do not read the work of scholars of color, but decide they can judge its worth despite that ignorance, it seems to me that a form of paternalism that is a product of race has been created. The words of black scholars, at least about race, are ignored by Judge Posner.<sup>53</sup> It seems to me that this action on the part of Posner and other legal scholars and judges is a form of the master voice. At its heart is a view that only "our" view of the world matters. It is a view particularly rooted in notions of majoritarianism, and it excludes the concerns of black people. If it is not possible to say that this action is racist, then it seems to me that there is no possibility of challenging the master voice.

When, for example, Stephen Carter criticizes much of the processes of traditional tenure matters without labelling them racist,<sup>54</sup> white faculty—intelligent, well-read, white faculty—read him as endorsing what has taken place.<sup>55</sup> Describing actions as racist is an important counterpoint to the master perspective that is too often adopted by scholars and judges in their work. Those I have charged with racism and white supremacy should have the freedom to respond. If I have overstepped the boundaries of fairness, they should have the freedom to respond to this as well. I too can be parochial or short sighted or just plain wrong about how to interpret a particular situation.

However, the response that a person once did a nonracist thing is not responding in kind. It assumes that racism is a kind of disease that can be cured by one dose of medicine or a sin that can be forgiven by

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(albeit probably unconscious ones), and also for the hope . . . that a diversity of approaches . . . are desperately needed antidotes to complacency and stagnation. There is some evidence that feminism has had this effect . . . maybe minority scholarship will as well. I think not, myself. And one reason is that whereas feminism is an approach (or cluster of approaches) race is not . . . . The problem . . . is that *not all blacks are culturally black*.

Richard A. Posner, *Duncan Kennedy on Affirmative Action*, 1990 DUKE L.J. 1157, 1160-61 (emphasis added) (footnote omitted).

52. *Id.* at 1161.

53. See generally Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349 (1992); Richard Delgado, *The Imperial Scholar: Reflections On a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984). In both of these pieces Professor Delgado argues that black scholars' work in the area of race is less likely to be cited. If Delgado's claim is true, it is probably because white scholars cannot hear black scholars. See Culp, *supra* note 21, at 1021.

54. See generally Stephen L. Carter, *Academic Tenure and "White Male" Standards: Some Lessons from the Patent Law*, 100 YALE L.J. 2065 (1991) (denying that there are white male standards but criticizing some of the standards in use and proposing his own).

55. See Carrington, *supra* note 10, at 597.

one act of contrition. Such absolution does not exist, because racism is not solely an individual thing. When the juror in the first trial of the officers who beat Rodney King permitted a black girl to have something she was entitled to, he was not excused from other acts of racism. When Judge Posner commits a nonracist act or even an anti-racist act, it does not excuse other actions which can be interpreted to be racist.<sup>56</sup> If racism is to be eradicated, then the racist system has to be attacked. This means that black students must be able to complain about their view of things that are racist to those who have the power to alter the present. This also means that sometimes scholars, judges and jurors are going to be wrongly accused of racism, but the alternative is to create a system where the racial status quo is protected—a status quo that has not done much in recent years to move African Americans toward equality.<sup>57</sup>

Too often, I believe, people of much goodwill adopt the view of Senator Danforth because they understand in their gut how pervasive racism is in America and are faced with two choices: either doing something about it all the time, or accepting the racial status quo and demanding that black people do the same. The attempt to point to the good deed done to eliminate racism is the heart of this effort. As long as we look at the single deeds, we do not have to look at the system of oppression in America. It is the racial equivalent of thinking that the individual's actions are the same as the group's. In this instance, it is the assumption that the individual's good deeds amount to systematic change. Of course racism will not be defeated without individual efforts, but these will produce change only if they are part of a systematic change in attitude and action. Attitudes will only change if people are free to discuss acts of racism and the system they are a part of.

### III. DAVID DUKE, THE SUPREME COURT, AND RACIAL POLITICS

I feel a kinship with David Duke. I am not white or a former Nazi, and I have yet to experience the joys of plastic surgery. But David Duke and I were born in the same year on opposite sides of the racial divide in this country, and as I have watched his campaigns for gover-

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56. For example, if Judge Posner or Chief Justice Rehnquist were to hire an African-American law clerk, it would be a good act and an antiracist act. Indeed, I believe it would be an act not accomplished by a number of white liberal judges. But my point is that to hire an African American clerk would be just one act, and in my view it would not absolve them of other actions that are racist or support white supremacy.

57. See generally NATIONAL URBAN LEAGUE, *THE STATE OF BLACK AMERICA* 1993 (Billy J. Tidwell ed., 1993).



nor and senator, I have come to see him as my brother. David Duke is angry, and I am the person with whom he is angry.<sup>58</sup> Like a modern version of Cain and Abel, David Duke has been able to speak to a majority of white people in this country that believe I ought to be slain (politically).<sup>59</sup> When I see the ruddy faces of the Duke crowd, I see that uniquely American ability to make race all-important without dealing with it. David Duke has seemingly been defeated, but he of course is not quite dead. His allies are important in Louisiana, and his views have influenced the country even as they seem to have been rejected by the ballot.<sup>60</sup> Indeed, much of the Supreme Court's jurisprudence on race would be an effective part of the propaganda machine of a Duke candidacy. It is not logically sufficient, of course, to say that a white supremacist and the Supreme Court agree on race, and that therefore the Supreme Court is an instrument of white supremacy. Rather, the point I would make is that the world view about race is now shared by both David Duke and the Court, because in important ways they share

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58. For a similar perspective by a black woman see Jennifer M. Russell, *On Being a Gorilla in Your Midst, or, the Life of One Blackwoman in the Legal Academy*, 28 HARV. C.R.-C.L. L. REV. 259 (1993):

Somewhere out there in the wilderness is a dispossessed white male whose privation was caused by my appointment to the law faculty. Chances are, he is the same white male from whom I earlier misappropriated an entitlement when New Jersey's third largest law firm hired me as an associate attorney, when the United States Securities & Exchange Commission hired me as a staff attorney, and when New York University Law School accepted me as a member of the class of 1984 . . . . [M]y achievements, academic and professional, will forever enjoy only a presumption of theft. That perceived rapaciousness is just one of the many dilemmas I confront as a gorilla in your midst.

*Id.* at 259.

59. Duke, a former Nazi and founder of the National Association for the Advancement of White People, garnered 60% of the white vote and 75% of the white male vote in the campaign against Bennett Johnson for the United States Senate. See David Maraniss, *Duke Emerges From Loss Stronger Than Ever*, WASHINGTON POST, Oct. 8, 1990, at A1. See also Peter Applebome, *Louisiana Tally Is Seen as a Sign of Voter Unrest*, N.Y. TIMES, Oct. 8, 1990, at A1 (quoting a white, college-age supporter of Duke, "The Blacks are just taking everything . . . . They're taking everything from us, and the white race is going down the tubes. It's about time someone spoke up for white people.").

60. See Michah L. Sifry, *Anti-Semitism in America*, NATION, Jan. 25, 1993, at 92.

A little over a year ago, neo-Nazi ex-Klansman David Duke was defeated in his race for the Louisiana governorship. This past November, with far less fanfare, nineteen Duke supporters were elected to the Republican state central committee. Together with a bloc of fifty-one Duke friendly fundamentalist Christians—led until recently by the Rev. Billy McCormack, who supported Duke during his gubernatorial campaign (something McCormack now denies)—they will make up close to a working majority of the party's main organ.

*Id.*

a common goal—the protection of the racial status quo.

I am one of the relatively small number of black people who, through measures of luck, hard work, and government policy, have “made it.” I teach law at one of this country’s major law schools, and one of the courses I teach is Employment Discrimination. I have a nice salary, and in these economically awkward times my tenured position provides me with a kind of job security that is fast becoming obsolete in this country. In short, I have what David Duke tells whites they have lost to affirmative action. The unstated premise is that except for affirmative action, David Duke, or one of his white followers, would be sitting in my chair and looking at his pictures on the wall of my office (no doubt replacing my picture of Billie Holiday with one of Marilyn Monroe).

David Duke has come to this belief honestly. Former President Bush consistently called civil rights legislation of the 1990s a “quota bill,” and important liberal and conservative commentators have attacked the results of race conscious public policy that helped to change for a time the economic position of black people and women. When David Duke uses quotas, affirmative action, and welfare as code words that equal blacks, he finds that many white Americans agree.

Why is it that, as the nightly news commentators have intimated, many white Americans believe they have legitimate complaints against black people? The reason for this belief is that there are two assumptions that people have made about public policy that are not supported by any empirical or other support but that have become mythic.

The first assumption is that all that black people have gained in the last twenty years, they gained through some unfair racial preference. I experience this assumption almost every day. My favorite, most recent example was a visit to a new white young female dentist this summer. My former dentist had retired, and I went in to have a front tooth cap replaced by his successor. My new dentist wondered whether I was a student. I said no, that I taught law. She then asked where I went to law school. (At this point I know the implicit question is, how did *you* become a law professor, but I also know that some of you will view this insight as a product of an overactive imagination.) I responded that I went to Harvard Law School. My dentist then asked the question that proves my point. She asked, “[Did you go to law school] on a scholarship?” I said no, that I had worked my way through law school. She asked that question because the persistent myth among many white Americans is that all blacks have gotten through school on the basis of the vast amount of scholarships available to black people but not white

students.

I come up on this myth whenever I talk to law students or my colleagues about legal education.<sup>61</sup> Indeed, despite the fact that we do not provide full scholarships to most black students, my colleagues have been known in arguments about affirmative action to make that assumption. One of my faculty colleagues during a recent meeting stated that affirmative action meant that he, the son of European immigrants, could not get a scholarship to our law school today (he had gone to a law school 30 years ago on such a full scholarship). The truth is that most scholarship money goes to white students, and people like him still have a better chance of getting into our law school and getting a scholarship than does the average black person in our country.<sup>62</sup> My dentist assumed that I could not have gotten to where I am without that "unfair" help of scholarships that whites didn't get. This is not true, and more importantly, the real assumption is that black people are unworthy, so that they cannot have gained anything important unless it was gotten unfairly. Many white Americans make this assumption (even the well educated and the people who like to think of themselves as non-discriminatory). Some people want to blame this belief held by white people on the few race conscious remedies that have taken place in America (what is called affirmative action). Affirmative action, however, simply has not been extensive enough to bear the burden of such a racial present. Like the Duke supporters who claim to have black friends, the people who hold this negative view of black people are not bad—they are just American and racist.

The other mythic assumption is that affirmative action has hurt white lower middle class men. I also believe that this myth is wrong.

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61. There is a tendency to think that I am overly sensitive to this question and similar issues, but I have yet to hear a plausible alternative view of what my dentist meant. As I teach more and more students about race I hear more and more of them make similar claims or ask similar questions. I have listened to too many people ask that question in more and more bizarre ways. In this sense I reflect the results of the *USA Today* poll on black Americans' attitudes about racism and change. Older black Americans like myself are more skeptical of the likelihood of change, and we believe that discrimination is a significant factor contributing to the problems of black Americans. See Patricia Edmonds, *Civil Rights Issues, by Age and Race: Older Blacks Blame Bias*, *USA TODAY*, Aug. 30, 1993, at A3.

62. Paul Carrington argues that perhaps Vietnamese boat people are "more deserving" than black people, but his view makes several assumptions about the history of black people and Vietnamese boat people that are not always going to be correct. In addition, it seems to me a nonsequitur, both in terms of numbers and in terms of dealing with our own racial past, to talk about boat people and ignore the discrimination that exists in our country. See Carrington, *supra* note 13, at 1136-65.

David Duke attacks the Supreme Court's decision in *Griggs v. Duke Power Co.*<sup>63</sup> which the recent civil rights bill has reinstated. A unanimous Supreme Court, in a decision written by Chief Justice Burger, held in *Griggs* that employment policies that were built in headwinds against black progress violated the 1964 Civil Rights Act. (In that case, many incumbent white workers could not satisfy the requirement that applicants for hire have a high school education and pass intelligence tests.) Duke suggests that *Griggs* has left in its wake a string of wounded white male members of the lower class because *Griggs* requires employers to hire a reasonable number of black workers from the pool of available workers or explain that failure in court if sued. However, the true beneficiaries of affirmative action have been white women, black men and women, and white lower class males. *Griggs* helped to accelerate the decline of policies that excluded children of immigrants and other lower class whites. Lee Iacocca does not owe his job directly to *Griggs* and the changes brought about by the 1964 Civil Rights Act, but sons and daughters of various European groups have been aided by the reduction in cronyism, anti-Semitism, and anti-Catholicism that the 1964 Civil Rights Act and the *Griggs* decision fostered.

The 1964 Civil Rights Act is the only governmental incentive to limit such cronyism. After all, despite the language of former President Bush and David Duke, there is no general federal legal requirement that employers must hire the most qualified employee.<sup>64</sup> This truth could not have been made clearer than by the Supreme Court in two cases at the end of the 1992-93 term.<sup>65</sup> In each, the Court adopted a view of the victimhood of white America and the consistency of its opposition to racial progress. John Calmore has pointed out that Americans believe that racism exists, but are reluctant to do anything about it.<sup>66</sup> We

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63. 401 U.S. 424 (1971).

64. See *Smith v. Horner*, 839 F.2d 1530, 1538-39 (11th Cir. 1988) (providing that Title VII "does not require an employer to hire or promote the most qualified candidate. Nor does it require that a candidate be given *preference* over other applicants because of race. Rather, it merely requires that employers not disadvantage certain employees based on race . . ." (citation omitted)); *Wright v. Western Electric Co.*, 664 F.2d 959, 964 (5th Cir. 1981) ("[i]t is also unnecessary for the employer to prove that those hired were *more* qualified than the plaintiff for the job. The employer has discretion to choose among equally qualified candidates, provided the decision is not based on unlawful criteria.") (citation omitted).

65. See *Shaw v. Reno*, 113 S. Ct. 2816 (1993) and *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993).

66. See John O. Calmore, *North Carolina's Retreat from Fair Housing: A Critical Examination of North Carolina Human Relations Council v. Weaver Realty Co.*, 16 N.C. CENT. L.J. 154

should not be surprised that the Supreme Court has the same view.

Political influence and power start with political participation in this country. Political participation has been at the heart of much of the dispute about race in America.<sup>67</sup> It should not surprise us that voting rights and race have been substantial issues for the Supreme Court. During the 1993 spring term, in a decision that can only be called the most fatuous of this century, the Court concluded in *Shaw v. Reno*<sup>68</sup> that five white plaintiffs need not plead a cause of action in order to seek constitutional relief on the grounds that a district in which some of them live is oddly shaped. In response to the United States Justice Department's objections under the preclearance sections of the Voting Rights Act, the state of North Carolina increased from one to two the number of districts in North Carolina that had a black majority. One of these districts stretches from Charlotte to Durham along I-85.<sup>69</sup>

The Court concluded that these five plaintiffs were not even claiming to be white—just citizens. Justice O'Connor concluded for the majority of the Court that these white plaintiffs had been injured because of the distortion in the electoral process. Justice O'Connor points out that the plaintiffs' claim is "that the deliberate segregation of voters into separate districts on the basis of race violated their constitutional right to participate in a 'color-blind' electoral process."<sup>70</sup> The only violation that can really be at stake is the right to absolute control of

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(1987) (addressing the burden of proof in housing discrimination litigation).

67. See generally *CONTROVERSIES IN MINORITY VOTING* (Bernard Grofman & Chandler Davidson eds., 1992) (discussing the Voting Rights Act and related issues).

68. 113 S. Ct. 2816 (1993).

69. The notion that people in this district have little in common except color is contradicted by the caravans of cars going from Charlotte to Chapel Hill along I-85 for basketball games and the reverse flow of those cars to Charlotte every spring for the ACC basketball tournament. In modern times I can confidently say that a number of people have been along I-85 more often than they have been to other parts of Durham. In addition, the Court has ignored the recent histories of Charlotte and Durham, where racial appeals were able to partially unseat incumbent black mayors and replace them with white conservatives. One way of looking at the suit by these five white plaintiffs is as part of a plan to take back political power from black people in Durham.

I may, in this instance, be unfair, but it also seems to me that it is no accident that two of the five plaintiffs are Duke Law professors. One way of preventing changes that people find discomfiting is to seek support from superior powers. Instead of arguing with their colleagues about change, perhaps the changes that really concern them, they can seek redress in a court untainted by adverse opinions. Indeed, with the Court now including Clarence Thomas, they can find a black voice that will agree that they indeed have been aggrieved. I am not questioning the right of these five plaintiffs to seek redress, but I do question what led them to find this the appropriate issue.

70. *Shaw*, 113 S. Ct. at 2824.

the electoral process by the country's white majority. These districts do not require that only black candidates can win. Indeed, if liberal white candidates had run for office in the districts in question, they might have won. I take it that if the legal issue was the right to participate in a color blind electoral process, then any person in the United States could have brought this case. Even if I do not reside in North Carolina, my own vote in Pennsylvania or Virginia is tainted by my representative having to vote in the House of Representatives with a candidate elected through this unfair process. Justice O'Connor suggests that this is not a slippery slope and that not every part of redistricting will become subject to constitutional challenge, because there are racially neutral procedures that a state could utilize. This is another fantasy of the Court. The neutral standards that the Court would utilize all permit the state to look at factors that reveal much about the race of the parties. In addition, other neutral principles such as the protection of incumbents and the use of existing housing patterns are products of a history of racial exclusion.<sup>71</sup> The Court would accept those principles as neutral because they protect the racial status quo.<sup>72</sup>

The Court's conclusion was that the five white plaintiffs had been injured by a redistricting plan that left most districts in the hands of white majorities and permitted whites to organize and vote in the two oddly shaped districts. This is just further evidence that the Court has concluded that even control of two districts is too threatening to the white majority's ultimate control of the country. In that sense, white Americans are demanding, and the Court is approving, the master control of electoral politics, and the Court has bought into the victim status of white Americans.

In many ways, a case that does not involve constitutional matters is

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71. Some are going to contend that the lack of black representation had nothing to do with discrimination, but was simply the product of blacks' lack of qualifications. Since, however, I reside in the 12th Congressional District now represented by an African American with a Yale Law degree and a state now represented in the Senate by two white people who did not graduate from college, I find that a hard argument to sustain. Indeed, Senator Helms defeated a black graduate of Clemson and Massachusetts Institute of Technology who works as a successful architect. See CONG. Q. 1994, at 1113 (Phil Duncan ed., 1993) (providing that Jesse Helms attended Wingate College and Wake Forest University but does not have a degree); Bethany Kandel, *The New Senators: An Old Friend Swipes Sanford's Senate Seat*, USA TODAY, Nov. 5, 1992, at A8 (describing how Senator Faricloth, a "self-made millionaire with a high school education, took over his family farm at age 19.").

72. See also Jerome McCristal Culp, Jr., *The Intersectionality of Oppression and its Negation of Color Blind Remedies: Affirmative Action, Race, Gender, and Class*, N.Y.U. L. REV. (forthcoming Fall 1993).

the best evidence of the similarity between David Duke and the Supreme Court. To David Duke and the Supreme Court, we live in a time when African-Americans are more likely to get a job than white people. They look around and see black people with jobs that used to be only white, and they say there must be injustice. David Duke reminisced, as a part of his stump speech lamenting the change in America, that Miss America used to be white.<sup>73</sup> While I believe that most people on the Supreme Court would not subscribe to that specific complaint, a majority seem to have a similar attitude about blacks with supervisory jobs. Melvin Hicks, an African-American, was originally hired by St. Mary's Honor Center, a state-operated halfway house, as a corrections officer. He rose from that position without incident to be the shift commander. He occupied that position with a satisfactory employment record. After a change in management, Melvin Hicks had difficulty with his supervisor, and through a series of escalating tensions and maneuvers Mr. Hicks was ultimately discharged.

After Mr. Hicks proved a *prima facie* case,<sup>74</sup> St. Mary's Honor Center suggested that there were two nondiscriminatory rationales for his discharge. First, St. Mary's suggested that the severity of the rules violations and, second, the accumulation of those rules violations were sufficient for his discharge.<sup>75</sup> The district court judge, sitting as trier of fact, found that this employer's rationale was without basis, but concluded that Hicks had not met his burden of persuasion because the basis for the discharge could have been personal rather than racially motivated.<sup>76</sup> The court concluded that race must not have been in-

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73. As a purely interesting sidepoint, one black Miss America was elected while she was a Duke Law Student.

74. The Supreme Court described the *prima facie* case in this interesting way:

The plaintiff in such a case, we said, must first establish, by a preponderance of the evidence, a "*prima facie*" case of racial discrimination. Petitioners do not challenge the District Court's finding that respondent satisfied the minimal requirements of such a *prima facie* case ([as] set out in *McDonnell Douglas* . . . ) by proving (1) that he is black, (2) that he was qualified for the position of shift commander, (3) that he was demoted from that position and ultimately discharged, and (4) that the position remained open and was ultimately filled by a white man.

*Hicks*, 113 S. Ct. at 2747 (citation omitted).

This description is interesting because it may presage another change in the law by a majority on this Court. By saying that the job was filled by a white man, the Court suggests that it may be a defense to these suits to show that a white person took the job not given to the plaintiff. This would not be a surprise, given the direction of the Court, and it would make for the interesting fact that race could be used as a shield by employers.

75. 756 F. Supp. at 1250.

76. *Id.* at 1252.

volved because "two blacks sat on the disciplinary review board that recommended disciplining respondent, ... respondent's black subordinates who actually committed the violations were not disciplined," and because "the number of black employees at St. Mary's remained constant."<sup>77</sup>

In the world of David Duke, black people have no color unless they express it. The supervisor no doubt did not even know that Melvin Hicks was black. In a world where race is only slightly less important in personal identification than gender, how can a person not have a race? Race matters, yet the Supreme Court says it is not personal. Indeed, since the employer did not argue that this was a personal dispute and since the supervisor testified that he had nothing personal against this employee, the Court has created a defense that the employer does not even have to plead or argue. The district court and the Supreme Court can tell that race does not matter, not from any evidence before it, but from the air. The Supreme Court covers its views with a lot of language about fairness and adherence to previous decisions, but the truth is that it believes that the real victim in this case is the white man who did not get the job in the first place.

Do not misunderstand the importance of the Court's ruling in *Hicks*. Any jury or judge who concludes that discrimination might be the product of "personal" bias cannot be second guessed by a circuit court. Indeed, in those actions now entitled to a jury trial under the 1991 Civil Rights Act, the plaintiff may be required to give a jury instruction about personal bias, even if the employer has not argued that it took place, or has denied it. As the Court describes it, personal bias is a shield that cannot be penetrated. An employer would be better off not even discussing personal bias and hoping that a friendly trier of fact will find it. Only a court that looks at the world through the lens of David Duke's views could see this as being an agreeable result.

The district court's conclusion seems to ignore the possibility that, while some people are willing to tolerate blacks in lower level positions, they are opposed to them in supervisory positions. In addition, the court assumes that black people will never participate in their own oppression, a position that recent history does not support.<sup>78</sup> A smart

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77. *Id.* at 1251-52.

78. One, for example, has to shake one's head at Justice Thomas's vote on this case. As a former Chair of EEOC he had to know that the majority's position on *Burdine* is silly, sillier than the minority make it out to be. His conservatism and adherence to principle should have led him to adhere to that position, especially since at least six of this Court's rulings in this



supervisor would make sure that there are black people on the committee to get rid of a black person. Black people can be duped or paid off to participate in their own oppression.<sup>79</sup>

Justice Scalia holds this view when he argues that enforcing the original view of *Texas Department of Community Affairs v. Burdine*<sup>80</sup> would create a situation where a fired black supervisor could be the only effective witness to the racial nature of an employer's decision. Justice Scalia said:

Assume that 40% of a business' work force are members of a particular minority group, a group which comprises only 10% of the relevant labor market. An applicant, who is a member of that group, applies for an opening for which he is minimally qualified, but is rejected by a hiring officer of that *same minority group*, and the search to fill the opening continues. The rejected applicant files suit for racial discrimination under Title VII, and before the suit comes to trial, the supervisor who conducted the company's hiring is fired. Under *McDonnell Douglas*, the plaintiff has a prima facie case, and under the dissent's interpretation of our law not only must the company come forward with some explanation for the refusal to hire (which it will have to try to confirm out of the mouth of its now antagonistic former employee), but the jury must be instructed that, if they find that explanation to be *incorrect*, they

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area have been recently overruled. Clarence Thomas has to know that personal bias can include race, and his failure to see it shows that there is no pure anti-racist essentialism even among the oppressed. See generally *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (in which the United States wrote briefs representing the EEOC's position).

79. One colleague has argued that I am being inconsistent in this argument. I have asked employers to ask the race question in their activities. See Jerome McCristal Culp, Jr., *Notes From California: Rodney King and the Race Question*, 70 DENV. U. L. REV. 199, 200 (1993) (urging everyone to ask the race question). But my colleague argues that the employer in this case asked the race question to the extent of permitting blacks to participate in the result as part of the process of disciplining Hicks. The point that he misses is that asking the race question is not fulfilled by permitting black people to participate if the process is rigged to support white supremacy. The district court seems to have made assumptions about discrimination against black men that the Supreme Court has disallowed in other guises against white women. See generally *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (addressing a claim of gender discrimination). When a court does that, it seems to me that it improperly asks the race question. The district court in *Hicks* has not made clear whether the personal animus includes racial bias. To say that something is personal does not exclude something personal associated with race and every other interest protected by Title VII.

80. 450 U.S. 248, 252-253 (1981).

must assess damages against the company, *whether or not they believe the company was guilty of racial discrimination*.<sup>81</sup>

Why is it relevant to Justice Scalia that this fired supervisor is a member of a minority group? One answer could be that he is simply asserting the notion that one minority member will not discriminate against another, but that seems insufficient to explain his assumption. Justice Scalia has been the judge who, in most situations involving racial concerns, has ignored the race of participants in the legal process and has argued that race is irrelevant.<sup>82</sup> One interpretation of this concern is that Justice Scalia fears letting the word of a minority member control the fate of a company that Justice Scalia sees as controlled by majority interests. This hypothetical is racist, but Justice Scalia sees himself as the protector of the majority firm from the tyranny of the minority person. As the lower court noted in ruling against Hicks, the employer has not reduced the number of black employees and black people were on the board that voted to reprimand Hicks.<sup>83</sup> Once the employer has proven that he has done some good for black people, it is inappropriate—in the court's view—to put too large a burden on the employer. The example seems silly to anyone who knows even a minimal amount about employment discrimination. It is also silly because given the chance of winning such a suit, no lawyer would take this case. Moreover, since the EEOC is very unlikely to find that any discrimination happened here, it will not prosecute it for the affected employee. Given the example, the employer could prove with evidence from its records that it chose someone who was more than minimally qualified. If, in fact, this employer has chosen only the minimally qualified, the notion of minimal qualification does not seem to mean anything in the hypothetical. Indeed, any student given this hypothetical on an employment discrimination examination who cannot satisfy the proof requirements of *Burdine* would get a failing grade.<sup>84</sup>

This world of color blindness and racial harmony is not the world that I have or live in. One of my brothers was recently offered a super-

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81. *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2750-51 (1993).

82. See, e.g., *Johnson v. Santa Clara Transp. Agency*, 480 U.S. 616, 657 (1987) (Scalia, J., dissenting). See also Justice Scalia's views as Professor Scalia. Antonin Scalia, *The Disease as Cure: In Order to Get Beyond Racism, We Must First Take Account of Race*, 1979 WASH. U. L.Q. 147, 152-54.

83. 756 F. Supp. at 1252.

84. I stand by this statement despite the fact that five Supreme Court Justices seem to fail this test, including a former Chair of the Equal Employment Opportunity Commission.

visory position with a large company in a town with few black Americans. One of the reasons he did not take the job was that it was made very clear to him that people would not like working for a black man. When I was in law school a close relative of mine who was working for a state agency finished first on the approved tests for a certain position; the supervisors in charge refused her that position, though it would have permitted her to be home with her family. Instead, they provided a position with equal pay, but less flexibility. During the period when I was a law professor at Rutgers Law School in Newark and a teacher of labor law, my uncle served on the police force in the city where he lived. Though at the top of the promotion list, he was forced to take an *additional* test beyond those required of non-minority promotion candidates previously, before he could be elevated to become the first African-American lieutenant on the force. He had to sue to get the city to understand that he would not accept this action gracefully. In none of these situations were white people always evil or impolite to black people. Many of the supervisors thought they were true friends of my relatives, but they were willing to manipulate the situation to ignore the concerns of black people. While the evidence I present is only anecdotal, one does not have to go far to find similar stories from other black people. Black people are told to accept the hostility of white colleagues and to find comfort in their privileged position of being black. Every charge of racism is not real, but when the Supreme Court joins in adopting a view that racism does not exist, it has gone way too far, at least for the world I live in.<sup>85</sup>

In addition, as most civil rights lawyers will tell you, it has become increasingly difficult for black plaintiffs to win employment discrimination cases. This is due to provisions of the 1964 Civil Rights Act that left factual determinations to increasingly conservative Reagan/Bush-appointed federal judges and to the fact that participants in the judicial process are convinced that racial discrimination has been eliminated. If there ever was much race conscious activity, judicial interpretation and administrative enforcement of the last two Republican conservative administrations as well as timidity by a new Democrat afraid to deal with race, have almost eliminated those race conscious aspects of federal employment policy.

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85. See generally Jerome McCristal Culp, Jr. & Bruce H. Dunson, *Brothers of a Different Color: A Preliminary Look at Employer Treatment of Black and White Youth*, in *BLACK YOUTH EMPLOYMENT CRISIS* 233-260 (Richard B. Freeman and Harry J. Holzer eds., 1986) (discussing difficulties encountered by black youths looking for jobs).

If there are fewer jobs for lower and middle class white men in construction, automobile plants, and other blue collar occupations, it is not in any significant way a product of affirmative action. There are too few blacks and too little affirmative action for this to be the case. Affirmative action helped the economic status of black people in the 1970s, but since then public policy has eliminated most of those positive aspects.<sup>86</sup>

Despite these facts, we see an increasing belief among white Americans that the opposite is true. This is reflected in the opposition to programs like Pell grants and welfare assistance that are seen as benefitting blacks even though they are granted on a "neutral" basis. White Americans have increasingly begun to call any government policy that helps blacks even slightly more than whites affirmative action. If affirmative action is defined that broadly, no policy that changes the relative position of black people will be seen as appropriate. The opposition to affirmative action is not built on unfairnesses to whites, but on opposition to changing the status of black people in this country.

David Duke tells white people it is all right to be angry at me because I have a better job and make more money than some white Americans. The only thing that will assuage that concern is for me and the other small number of black people who have "made it" to quit our jobs and do something more appropriate. I have cleaned toilets, shoveled coal and flyash, ground steel, and left law classes early to earn the money to get the education that allowed me to become a law professor. I have also observed my parents put up with a vast array of racial indignities to help support my education and the education of my brothers and sister. I do not know whether I "deserve" the job I have, but I think if we start removing people who got jobs because of some unfairness, even based upon some simple notion of merit, we will remove a lot of Bushes and Quayles before we get to the first Culp. Indeed, if every black person gave up every job that puts him in the top quarter of American income earners, it would not eliminate the depression that is being felt by white professional and other white collar workers who have discovered that 12 years of Reagan/Bush economic policies have left them subject to the kind of economic bad times normally felt only by blue collar workers and black people. The fact that a majority of white Americans cannot see these racial truths is

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86. Richard B. Freeman, *Black Economic Progress Since 1964*, in *LABOR MARKETS IN ACTION: ESSAYS IN EMPIRICAL ECONOMICS* 105-19 (1989).

racist. The media, the Supreme Court, and sophisticated commentators do us all a disservice when they pander to racist mythology.

Many of these commentators claim that race has become unimportant even as it is clear that our failure to deal with the racism in our society fosters almost every important social ill, from education to crime. Class is an important concern, but it is clear that it is the interaction of class with race that is the most important creator of civic problems for the United States. All Americans pay a terrific price for our refusal to see the truth of the American experience with race. However, that racial blindness is part of the larger mythic structure that we have created about race in American society. When commentators speak about the legitimate grievances of the white working class without talking about the legitimate grievances of the black working class, they become part of the mythic structure that concludes that black people do not really count (or work or pay taxes for that matter).

Who has a better chance of becoming a law professor—a child of the black or white working class? The question is never posed because the answer is unimportant to those who get to speak through the mass media. Black people do not count in this discourse. When a television pollster says that the Democratic party has failed to reach out to the average voter in Louisiana, despite the Democratic candidate winning 61 percent of the vote, because that Democratic candidate got only 45 percent of the white vote, he is saying that black voters aren't real and don't really count. When the Supreme Court concludes we live in a color blind world, despite Urban Institute evidence that blacks are not treated the same on a job and evidence that they are not treated the same in buying automobiles, one has to conclude that the Supreme Court has decided to ignore reality and share a fictional present with the David Dukes of the world.<sup>87</sup> In this view black people are marginal, the other, the nonincluded. This view is racist and if we do not understand this fact we will continue to be led by Presidents who create these myths and appoint Supreme Court justices to enforce it.

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87. See Urban Institute Research Using Testing Documents Bias Against Black Job Seekers, Daily Lab. Rep. No. 94 (BNA), at A4 (May 15, 1991) (equally matched black male testers were three times as likely to be unfairly treated as white male testers). See also Culp & Dunson, *supra* note 85, at 233-60 (black and white youth do not experience the same job market); Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 819 (1991) (black male purchasers pay twice the markup as white male purchasers, black women pay three times the markup as white men, and white women pay a 40% higher markup than white men).

#### IV. A NOTE FROM SHOAL CREEK: AFFIRMATIVE ACTION, DIVERSITY, NEUTRALITY, AND HIRING IN THE LEGAL ACADEMY

My colleague, Paul Carrington, has written a series of four articles as part of his larger enterprise on the history of legal education.<sup>88</sup> In these four articles, Professor Carrington, a former Dean of Duke Law School, a member of the Executive Committee of the American Association of Law Schools, and a reporter for the Federal Rules of Civil Procedure, tries to prove that American legal education never excluded black students in an important way and that it was crucial in helping to overturn the racial present in the United States. Ultimately, these articles are a very bad brief for these positions, precisely because Professor Carrington fails to deal with important data that oppose his arguments. What Professor Carrington would like to conclude is that blacks were not lawyers because they were uninterested and because other institutions and rules blocked their progress.<sup>89</sup> In this view, American legal education did everything humanly possible and more to provide for the "elevation" of the black man<sup>90</sup> in America. His point is that American constitutional law is a kind of inoculation against the possibility of racism and that if we judge our forebears against the standards of their time we will find that they were the good guys (quite literally, of course, the good white guys). American constitutional law from its inception has been a harbinger of change, Professor Carrington argues, and we ought to be proud to read his history of legal education on the Fourth of July.<sup>91</sup> In truth, it is a history and an image of American

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88. Carrington, *supra* note 13, at 1105; Paul D. Carrington, *Butterfly Effects: The Possibilities of Law Teaching in a Democracy*, 41 DUKE L.J. 741 (1992); Carrington, *supra* note 14; Carrington, *supra* note 10, at 501.

89. Carrington, *supra* note 10, at 513-17, 548-51, 562-71.

90. I say "man" because nowhere in his more than two hundred pages does Professor Carrington really discuss black women or their concerns. In addition, part of Professor Carrington's defense is a claim that male chivalry, forced on men by women, led to the Civil War and to the other wars. Such claims are fanciful and unsupported with respect to white women, but Professor Carrington does not understand the extent to which these claims are simply incorrect with respect to black women. Chivalry meant for black women that they and the black men they love could be killed for an inappropriate look. [I include black women in this claim because a number of black women were indeed lynched in response to an inappropriate racial action by a black man.] For black women, particularly in the South where chivalry was strongest, buried inside chivalry were notions of racial oppression and rape. See generally JACQUELYN DOWD HALL, *REVOLT AGAINST CHIVALRY: JESSIE DANIEL AMES AND THE WOMEN'S CAMPAIGN AGAINST LYNCHING* (1993). Professor Carrington cannot see these issues because black women are invisible in his story.

91. Carrington, *supra* note 10, at 503.

legal education that could only be read on the Fourth of July through the lens of patriotic fervor. It is a lens I have a hard time picking up. It is a lens that is infused with all three strategies of racial oppression. Professor Carrington insists on controlling the debate wholly in his terms. He is in master mode when he has difficulty ever admitting there was discrimination in admissions or hiring. He attempts to portray the honest and hard-working liberal establishment as the victim of attacks from separatist elitists of color who insist on unreasonable change. Finally, he insists that racism is not and never was an important issue in American legal education.

Somewhere there is laughter among the Angels. A not so well kept secret has become public almost overnight. The Shoal Creek Country Club of Birmingham, Alabama, does not welcome persons of African-American descent.<sup>92</sup> Angels have to be laughing because this little truth is not new, nor has it changed very much with the changing times and opportunities of black Americans. The private country clubs and golf courses of America, North as well as South, are still white enclaves in an ever more black world. There is a larger unappreciated truth out there that lots of institutions, including law schools, are largely white enclaves. As one of the "honorary" whites,<sup>93</sup> I want to respond to my colleague Paul Carrington's<sup>94</sup> history of the country club we call American legal education.

I have been writing about the use of autobiography in legal scholar-

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92. Hall Thompson, the 67 year old founder of the Shoal Creek Country Club, was quoted as saying, "We don't discriminate in every other area except the blacks." Jaime Diaz, *Top Achievers and a Turning Point*, N.Y. TIMES, Dec. 31, 1990, at 40. Corporate sponsors pulled more than 2 million dollars of advertising after this statement, and that advertising was not replaced after the club hastily admitted an honorary black member. *Id.* The honorary black member, Louis J. Willie, is the 66-year-old President of the Booker T. Washington Insurance Company. *Shoal Creek Transition*, N.Y. TIMES, Dec. 30 1990, § 8, at 1. Shoal Creek Country Club was designed by Jack Nicklaus, and he and other top white pro golfers initially defended the white founder, arguing that the issue of club membership was a private matter. (I believe Fuzzy Zoeller was quoted once as saying, "Our job is to play golf. I don't have anything to do with politics.") As a direct result of this controversy, the PGA changed its rules to require that clubs sponsoring PGA events must have black members. Five of the clubs that normally would have been on the tour refused to change their policies. See Jaime Diaz, *Cypress Point Chooses to Surrender Its Status*, N.Y. TIMES, Jan. 31, 1991, at B11 (many of the players remain nostalgic about these clubs). Tom Watson, one of the top ranked golfers, resigned in late 1990 from his home country club because it would not admit Henry Bloch, who is Jewish, to be a member. Bob Verdi, *Watson Should be Applauded for Step in the Right Direction*, SPORTING NEWS, Dec. 31, 1990, at 42.

93. I am a Black American.

94. Dean Carrington is a nonblack American.

ship and teaching.<sup>95</sup> Institutions, as well as people, have autobiographies. In 1960 Duke Law School maintained a policy that excluded black students and faculty from the law school. This policy was part of a system of exclusion that in some ways was more extensive in the South, but extended to the North as well. It was part of a system of oppression of black Americans that has had, and still has, a profound impact on the way the world is constructed. All white people participated and benefitted from this exclusion in big and little ways.<sup>96</sup> Before looking at the exclusions and the discriminatory patterns that still exist in America, it is important to understand that race has mattered in the very fibre of our being. All of us stand where we are today as heirs of this racial system of exclusion.<sup>97</sup>

Law schools and the law have played a role in this system. In 1960, Duke Law School did not stand alone among law school members of the American Association of Law Schools (AALS) in either its policies of exclusion or its participation in the oppression of black Americans. Many other schools had similar autobiographies. Black Americans—despite the promise of *Brown v. Board of Education*<sup>98</sup>—could not be educated at their publicly supported state institutions of law in many parts of the South in 1960.<sup>99</sup> Of the 132 law schools that were members of the AALS in 1960, at least thirteen law schools had a policy that excluded black students from being educated and black faculty from teaching in their law schools. There are still a number of schools that existed in 1960 that do not have black faculty today.<sup>100</sup>

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95. See Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539 (1991).

96. I want to use "benefitted" in a particular way. I do not mean to suggest that it is not possible and probably not likely that the elimination of racism would make everyone, blacks and whites, materially better off. There is strong theoretical and some empirical support for such a view. However, it is also clear that nonblack Americans have enjoyed the rewards of status and position that race conveys.

97. Many nonblack Americans contend that they were not participants in the oppression of black people. This contention misses the point. All nonblack Americans have gained from the exclusion and oppression of black Americans. Of course not all beneficiaries of our system have gained equally, but all have benefitted from the fruits of that oppression, even if they or their ancestors were not slaveholders, and if they or their ancestors came to this country after some of the oppression was eased in this half of the twentieth century. There are fewer black Americans to compete for jobs as law professors, as college students, and as workers in the work force.

98. 347 U.S. 483 (1954).

99. This created a dilemma for many black students from the South. Some of them could get excellent educations in the North paid for by their home states.

100. These include the University of Chicago, though the dean would no doubt point out that



When my student assistants queried the 132 American law schools that existed in 1960 and were members of the AALS, they received a number of interesting replies. Many of the law schools seemed nervous about the question and, perhaps as importantly, nervous about their answers to these queries. Some law schools that historically maintained policies that explicitly excluded black students and faculty denied the existence of such policies, while others seemed both unaware of and unconcerned with this history. This policy of forgetting and denying our past is part of the claim of innocence that is at the heart of the system of racial exclusion in American law schools. We are innocent of the racism that exists in the world. It is the result of bad education or bad genes or bad culture that black people are a part of.

My colleague, Paul Carrington, sees these bleak numbers and cries that it does not express the justice of what has been done "for" black people, faculty, and students. He would defend the sincere desire of our colleagues in the legal academy to hire black faculty with anecdotal evidence of nondiscriminatory intentions and with statistical proof of a lack of a pool of qualified candidates.<sup>101</sup> He says, I paraphrase, "we [the elite law schools] have done enough, or plenty, or at least some, and we are not bad people." Of course Paul Carrington has forgotten our history of oppression and discrimination. No oppressors of black people (or those who acquiesced in that oppression) have thought that they were bad people. Many have claimed to be doing the right thing. White masters claimed that they were protecting the "child like" slave from his own lack of intelligence and tendencies to slovenly and unproductive activities. Black codes were enacted by the post civil war southern governments to protect black citizens from their own lack of

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they were the first great American law school for majority students to hire a black faculty member.

101. These explanations cannot explain everything, of course, so Professor Carrington writes:

For most schools in 1930 to appoint even Charles Hamilton Houston required more imagination or more moral courage than they could muster . . . . *From our vantage point, it is hard to imagine how Houston or Hastie would have fared before an audience of, say, 150 Michigan Law students for the task would have been much more daunting than the one faced by Jackie Robinson in 1950.*

Carrington, *supra* note 10, at 584 (emphasis added).

It is unclear what point Professor Carrington is trying to make with this comment. It certainly does not suggest that law schools were the place of greatest moral courage. Indeed, he starts by writing about 1930 but ends by writing about 1950. If law schools were so free of racial animus, why would 150 white Michigan males be so daunting to Charles Hamilton Houston? After all, Houston had been educated with white people in this country and abroad. There is an inconsistency in the way that Professor Carrington wants to portray law schools of this era.

expertise with freedom. The white southerners who redeemed the South from the reconstruction-era legislation and integrated government were simply protecting the redeemed black citizens from their own inability to participate in governmental affairs. Even when white institutions and people did not actively participate in this system of oppression, they almost always assisted in the process by acquiescing in the status quo. In that acquiescence they gained status and power. My colleagues' claims that it is not important or possible for black citizens to participate in the legal academy are of a similar nature. Paul Carrington's argument that there is no pool of candidates that is accessible to elite law schools does not survive the test of truth or history.

Paul Carrington writes an autobiography of the AALS that is unrecognizable as the situation that actually existed in American law schools. Professor Carrington argues that *Bakke*<sup>102</sup> may make affirmative action in hiring illegal, but he does not discuss the history of law school discrimination in the membership of the AALS. Reading Professor Carrington's account, one is unaware that the state of Missouri had to be sued to admit a black law student in 1939. The Supreme Court affirmed the right of black students to go to public law schools in that case, but it does not seem to have influenced the AALS for more than ten years. In 1950 we have the first recorded discussion of discrimination in admission of black law students. Yale introduced a resolution that would have disqualified for membership law schools that "excluded or segregated minorities," and would have required existing members to provide students an equal opportunity for admittance or lose membership status. At the same meeting the AALS adopted a resolution that said the AALS opposes segregation on racial grounds and that it is the duty of schools to abolish such practices at the earliest possible time. This resolution also required the appointment of a committee to look into the ramifications of making nondiscrimination a requirement. Duke's representative voted against this resolution.

The committee, mandated by the vote in 1950, argued for the law school version of "all deliberate speed" through a process of trying to convince the governing boards of discriminatory universities of the wisdom of nondiscrimination during the 1951 meetings of the AALS. The committee proposed and adopted a resolution that nondiscrimination is beneficial to legal education. This proposal suggested that the issue be reexamined in 1953. The AALS in 1951 again voted down the Yale

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102. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

proposal with Duke voting against it. In 1956 President Hecke of the AALS described the AALS's efforts to end discrimination.<sup>103</sup> He described the difficulty Vanderbilt Law School encountered in the fall of 1956 when two black students were admitted. The Vanderbilt alumni held a meeting where they voted 56 to 12 to request the trustees to make sure that no more negroes would be admitted.<sup>104</sup>

In 1957, the committee recommended the suspension or expulsion of schools that denied admission to an applicant on the ground of race or color.<sup>105</sup> Dean Latty of the Duke Law School opposed the amendment. Though he said he favored the policy as a matter of social reform, he argued that the trustees of Duke University were not prepared to admit colored applicants.<sup>106</sup> Dean Latty contended that the proposed resolution would not change the minds of these trustees.<sup>107</sup>

The efforts to integrate the student bodies of these schools happened slowly and continued through the mid-1960s, long after *Brown* and almost 30 years after *Gaines*. Could the autobiography of the AALS have been different? Certainly, some of the membership thought so, but that is irrelevant to the autobiography as told by Paul Carrington. When he went into teaching this history was fresh in the minds of the participants in the AALS, and he and his predecessors at places like Duke chose to go along with their trustees in continuing this process of racial oppression. Recently, Tom Watson, one this country's best professional golfers, has won a great deal of praise for resigning from his home country club in Kansas City that prohibited the admission of Jewish members. A question only a few of the media stories have raised is why it took so long for the Tom Watsons of the world to see the discrimination that was palpably surrounding them. Law professors, like the professional golfers of the world, would like to claim that they never discriminate, but it is either a lie or an exaggeration. When Paul Carrington started teaching in 1958, many schools still had difficulty admitting Jews and other white ethnics.<sup>108</sup> Not all of

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103. *Association of American Law Schools 1956 Proceedings* 85-92 (1956).

104. *Id.* at 87.

105. *Association of American Law Schools 1957 Proceedings* 95-98 (1957).

106. "First and foremost, the proposal is a social reform. Purely as a social reform, I personally endorse it. I think it is good. My faculty thinks it is good . . . [However, our] University Trustees are not yet prepared to admit colored applicants." *Id.* at 96.

107. Since I have pointed this history out to Professor Carrington in a letter and then in a published article, you might think that he would at least respond to that evidence about law schools, but of course one would look in vain for such a response in the almost three hundred printed pages he has written on this subject. See Culp, *supra* note 12.

108. "It is certainly possible that some Catholic and some Jewish students were excluded from

the professors were in favor of the change. This is obvious to the students who joined the student bodies of these law schools in the North as well as the South, even if it is not clear in Paul Carrington's history. Professor Carrington ignores the other integrations that have taken place in higher education. The sorry history of American law schools with respect to Hispanics is largely ignored in his discussion.<sup>109</sup>

One of Professor Carrington's biggest assumptions is that the only schools that actually discriminated were those that officially discriminated in admissions. It was true that black people could not eat everywhere in the North before 1964, despite laws that nominally protected them; thus, the fact that officially there was no discrimination did not mean that discrimination did not take place.<sup>110</sup> I would like to know what the people who attended these institutions would say about their treatment. When we read autobiographies of such individuals, we often do not find a rosy picture of nondiscrimination.<sup>111</sup> It is true that a number of institutions graduated black students during the 20th century, but it is also true that black lawyers had to fight to be able to take the bar and practice and join the American Bar Association at the beginning of this century. Professor Carrington acknowledges that some discrimination took place, but he contends that everything that could have been done, was.

Professor Carrington makes three assertions that are either highly

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some law schools, particularly in the area of New York City, where the immigrant xenophobia seems to have been centered." Carrington, *supra* note 10, at 555 (emphasis added).

109. See generally Michael A. Olivas, *Latino Faculty at the Border*, CHANGE (May/June 1988) (discussing the problems Latinos face in entering the teaching of law).

110. I learned the power of this fact when my parents visited me on their wedding anniversary, and we discussed what they ate when they got married. My mother said she had fish, and I asked why they had not gone somewhere nicer than the place she described. She reminded me that when they got married in 1949, many places near where I grew up would not admit black people. Some of these places of course were nominally covered by the antidiscrimination statutes then in place, which even then were not always enforced, particularly in rural areas. The South was not the only place that race mattered, and what was officially on the books in Pennsylvania often had no more to do with reality than what was the official constitution of the Soviet Union. Paul Carrington either does not understand this fact or has forgotten it. The power of such exclusions meant that my family used to drive 60 miles to a park near Pittsburgh that was largely frequented by black people because we were not sure that local swimming pools would be gracious to our black family. Such fears may have been overblown, and certainly maybe our family ought to have fought such fights more frequently, but it is not true that the segregation that was more typical in the South had no impact on us in the North. We did not have colored and white drinking fountains, but we did have segregation.

111. See generally J. CLAY SMITH, JR., *EMANCIPATION: THE MAKING OF THE BLACK LAWYER 1844-1944* (1993). One only has to read Professor Smith's work to appreciate how much of the real experiences of black people Professor Carrington did not discover.

debatable or wrong. First, he suggests that the AALS has no role to play in encouraging diversity in law schools through its accreditation policy. Given my own experience with faculty decision-making, I would like the AALS to encourage greater diversity. Faculty seem to me to put too little emphasis on issues of "diversity." Second, Professor Carrington argues that any effort to discipline a school because it has failed to work effectively at the diversity issue, particularly "good" schools and "good" people, will intimidate and silence important ideas about the qualifications and standards we apply to hiring and promotion decisions. I understand this argument, but I have yet to experience such silence in any of the three law schools where I have taught. Faculty in that world of silence felt free to make comments that I thought were sometimes clearly across the line of racist comments, and I have heard very few charges of racism addressed to that crowd. Objectively, I would argue that I am much more likely to hear my colleagues claim that we are watering down our standards whenever we look at any minority candidate. Finally, Professor Carrington claims that law schools have done enough, that there is some point where standards have to apply and most importantly (if I can paraphrase his views) that "there are no minority faculty that ought to be teaching in a higher rank school or teaching at all who are not teaching already"; in other words, affirmative action has worked in American law schools with respect to minority (black) candidates.<sup>112</sup>

This last point is the most important from Duke Law School's point of view and that of law schools in general. The evidence that Professor Carrington presents is one-sided on this issue as well. The point that he makes is that statistically we have taken all the black lawyers we should into the legal academy, but the truth is that we can, and sometimes do, do better. Shortly after I joined the Duke Law School faculty as the first black full-time tenure-track faculty member in 1985, I wrote a memo to Paul Carrington (who was then Dean). I asked him to do three things as Dean to increase the number of black and other minority faculty. I requested that he consider having some black partners at major New York, Atlanta, and Washington law firms as visitors at Duke during their sabbaticals.<sup>113</sup> The last year that Paul Carrington

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112. Auerbach, *supra* note 13.

113. The individual who succeeded Paul Carrington as Dean, in partial response to a similar request, did in fact invite James Coleman to teach while he was on sabbatical from his law firm, Wilmer, Cutler & Pickering, in Washington, D.C. He taught a seminar and became enamored enough of (and in) our institution to join us as the second faculty member of color in

was Dean, the law school, at his initiative, had ten visitors. All of these visitors were men (nine white and one Japanese). Indeed, since I was hired at Duke (as the first and only black tenure-track faculty member), we have had no increase in the resident visiting faculty who were minorities until after Paul Carrington stopped being Dean.

It cannot be true that there is in all of legal academia no nonwhite person who belongs on the faculty of Duke University. As I examine the standards that he applied to the hiring of visiting faculty, it is hard to say that the pool of potential candidates is so shallow that it would not be possible, if we try, to find black candidates. However, at least at Duke Law School, these decisions are made at the complete discretion of the Dean, so the issue is what criteria and priority the Dean should or will put on "diversity."

I also requested that Dean Carrington consider trying to institute a program similar to the Hastie Program at Wisconsin. The Hastie Program takes minority law graduates and gives them an opportunity in a L.L.M. program to become potential faculty somewhere in the legal academy. I heard no response to that request, and we certainly have made no efforts to increase the number of black faculty directly. Finally, I suggested that we try to examine our efforts to increase the number of black and other minority visitors at Duke Law School through traditional channels. I am still waiting for a response to that memo, either directly or indirectly, through action. I observe no indication that he altered what he did as Dean. I have not made a scientific examination of the hiring practices of major American law schools, but anecdotally it is clear that the strongest factor in increasing the number of minority and women candidates at law schools is leadership by their deans. Where that leadership exists there is movement, and law schools create effective minority candidates and minority faculty. Where that leadership is lacking little progress is made, and most of our efforts go into fruitless discussions of why there are no minority candidates. This would itself be sufficient to suggest that Professor Carrington is not in a position to "cast the first stone" by suggesting that law schools have done all they could to recruit black and women faculty.

Paul Carrington makes the assertion that women and minorities have benefitted from affirmative action because we are a larger proportion of the number of lawyers in the country than are white males.

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1991. Jim won the teaching award and was one of our more popular teachers before he decided to go back to law practice this summer.

This statistical argument is odd because it assumes that blacks and women will have the same interest as white males in nonteaching law jobs. However, given the history of discrimination and the different life choices often facing women in this society, it is hard to believe that teaching might not be a relatively more attractive position. Professor Carrington does not attempt to evaluate the output of scholars of color and women, but as recent pages of the prestigious law reviews suggest, they are starting to dominate a large part of the debate. I would also like to know what it means "to benefit from affirmative action." Does Paul Carrington mean that they saw fewer students, taught fewer classes, or that they have carried the burden of university committees less onerously? I do not think that he can support that claim. Does he mean that the women and scholars of color are less intelligent than the average male scholar? I do not think he can support that argument, in my experience at four law schools. Does he mean that these women and scholars of color have achieved greater heights than an equally qualified man would in terms of his career? I want to know what that means in this context. Paul Carrington sees the academic world we live in as being much more neutrally centered than I do. Are there women and scholars of color in the legal academy who have benefitted from being women or scholars of color? The answer to that question has to be yes. Are there white men in the legal academy who benefit from being white men? The answer on many levels is yes. I would contend that if we examine the histories of our hiring and the hiring at other AALS schools, it is not possible to demonstrate that women and scholars of color have a distinct advantage because of their gender or race. White men benefit in a number of ways from being white men.

During the last eight years while Paul Carrington was Dean at Duke Law School, the faculty hired approximately 15 people. Less than a third of those hires can generously be considered the product of the kind of pool examination that he suggests we always do in making our hiring decisions. I take it when he looks at the pool, he is talking about individuals who register or might have registered with the AALS or who apply directly to Duke Law School for a job. We hired only one woman during this period, although the number of women graduating escalates each year, and we hired one minority faculty member, me. In both cases the candidates showed up and were thrust upon him. At Duke Law School, while Paul Carrington was Dean, we have created pools when we wanted to hire an extremely able South African to teach administrative law, and when we wanted to hire an extremely able political scientist with no teaching experience, and when we wanted to

hire an extremely able social scientist not employed in this country. Duke Law School has not considered international boundaries or failure to be part of traditional pools as impediments to efforts to hire faculty when we have not been looking for women and black and minority candidates. We have found slots and created posts without examining the pool in all but the most cursory manner, and I have been told by Paul Carrington and other colleagues that we would find posts and slots for minorities. We never found any candidates.<sup>114</sup> I did not hear my colleagues in these meetings, except occasionally for my own lone voice, berating Dean Carrington for the choices he led us to. A significant majority, including myself, voted for every candidate we have hired in this period, but I do not think we can talk about shallow pools. We have, like the other major law schools, invented the pools that we wanted to choose from. We have chosen not to invent very many black or minority candidates or to look too carefully in the pools that exist.

To put faces to this point let me describe a friend of mine, a black woman I met while doing research in Washington several summers ago who seems to have missed Paul Carrington's pool. She is an honors graduate of Vanderbilt University and a Marshall Scholar. She was selected to join the *Harvard Law Review* and she published her note.<sup>115</sup> She has clerked for an excellent court of appeals judge and was one of Thurgood Marshall's clerks during his last active term on the Court. Did we spend time talking to her about potential employment as a professor at Duke Law School? The answer is no, even though I asked our representative to talk to her when he went to Washington several years ago. How many of these overeager and overaffirmative action institutions in the AALS have spoken to her? The answer is one and a half. Vanderbilt Law School, her undergraduate institution, has tried to recruit her, and Chicago has spoken to Judge Higginbotham, the appeals court judge for whom she clerked, after he threatened not to serve on a moot court panel at Chicago. My point is not that every black person with similar credentials will be or in fact will want to be an academic. If we had talked to her, we might not have been able to convince her that she should come to Durham, or we

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114. Despite this claim, when I or others proposed scholars of color, they were either "too controversial," "did the wrong thing," or were not "distinguished" enough, except for Jim Coleman, to join our faculty.

115. She was granted credit for law work she did as a Marshall fellow and had written her way on to the Law Review before becoming a second-year student.



might have decided that she would not make a good law professor. The point is that affirmative action is not a very high priority at many law schools and it was not a very high priority when Paul Carrington was Dean.

Indeed, the actions of Judge Higginbotham support a larger point: most law schools, at least in this era, believe that it is not necessary to alter the existing lack of black candidates unless they feel internal or external pressure. If there are no minority people on the faculty, there is often little internal pressure for change. Without pressure from the AALS, students, and courageous judges, there will not be a change in the makeup of law schools, particularly elite law schools. This is not because the faculties of these institutions are generally populated with bad people. This is the mistake of form that Professor Carrington's history makes. He assumes that only people who wear hoods and burn crosses and scream racial epithets are bad people. Good people can be indifferent to issues of diversity in law schools and country clubs that they belong to. However, their indifference is not evidence of their goodness and is certainly not evidence of great sensitivity to the important issues that exist in this community. The best that can be said for American law schools is that they have been largely indifferent to making important changes in the composition of their faculties.

My female friend is not unique. When a former black student of mine<sup>116</sup> who had similarly been on the *Harvard Law Review* (and who had clerked for a Supreme Court justice and an excellent court of appeals judge) was in practice in Washington, I similarly tried to get our appointments committee to do what we do with some white candidates, which is to take him out to lunch and try to get him interested in Duke. It was not possible to create sufficient interest in this person's credentials to get him into our pool. He is now a tenured member of the Harvard faculty, but again I want to emphasize I have no reason to believe he was ever in our pool.<sup>117</sup> This is the truth. We have lots of choice as to whom to invent and we have chosen not to seek too deeply in the pools that include black candidates for appointment. Indeed, it has been my experience that if there is a false image that is being sought by law schools, it is in their effort to suggest that they have gone through real examinations of the pool when they have not.

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116. I was his teaching fellow in introductory economics when he was a student at Harvard College, and I was his pre-law advisor and wrote one of his letters of recommendation in which I confidently predicted he would make law review.

117. In 1992 my friend and former student earned tenure at Harvard Law School.

The most common practice in hiring people at law schools is to find a candidate and then to do a cursory search that is not meaningful. I am reminded of the candidate who was given a tenured offer of employment by a top ten school and then was suddenly sought after by several other schools. I believe that sudden interest was meant to pad the numbers of the efforts of these schools. Many law schools simply do not have much to crow about.

There are other questions that have to be asked of Professor Carrington's history of American legal education and race and gender. What does Professor Carrington mean when he writes, "[I]t is hard to imagine how [Charles Hamilton] Houston or [William] Hastie would have fared before an audience of, say, 150 Michigan Law students for the task would have been much more daunting than the one faced by Jackie Robinson in 1950"?<sup>118</sup> If indeed our law schools were places of nondiscrimination and Michigan had hired a black with the obvious qualifications of Houston, why would this have been as difficult as facing the prejudices of largely uneducated white ball players? There is an unexplained middle in Professor Carrington's argument that does not tell us when he would ever criticize our legal forebearers. Indeed, one might have thought that in thinking through these issues he might have discussed how we invented the American form of slavery, a form of slavery known in no other place and inconsistent with notions of common law and personal freedom. If the law is such a strong creator of change, why did the constitution not inoculate us against the strengthening of slavery? If the notion of justice is so strong in the American constitutional system, why did lawyers, led by arguments created by law professors, reinvent the Thirteenth and Fourteenth Amendments to leave black people to the mercy of southern state governments? All of these questions find no answers, or even a defense, in the history as told by Paul Carrington. His history becomes, in that sense, what we tell law students at night so that they will sleep comfortably. It will not do for the light of day or as a way of understanding our present.

I believe deeply that many minority scholars are doing scholarship that is altering the contours of legal discourse, and when the sun sets on our time in the legal academy, we will discover that the small amount of entry into American law schools that has been permitted to black scholars and students has paid disproportionate dividends. If we,

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118. Carrington, *supra* note 10, at 584.

the intellectual elite of law schools, are not to remain a Shoal Creek (a sea of whiteness with an occasional honorary black), we have no choice. We either change or we remain lost in our convictions of our good intentions. Congratulating ourselves for nonexistent efforts and changes that have yet to occur simply will not do. I say nonexistent advisedly—there are a number of studies that suggest that in fact women, and women of color are treated differently even in law schools. Professors Merritt and Reskin found that women of color are much less likely to be employed at prestigious law schools than men of color.<sup>119</sup> Similarly the editors of the *Wisconsin Law Review* summarized Professors Merritt, Reskin, and Fondell's findings:

The percentage of women on law school faculties grew steadily during the last two decades. *Women, however, still begin teaching at significantly lower ranks than men and are significantly less likely than men to obtain jobs at the most elite schools.* Observers often blame these discrepancies on women's commitment to their families and on their unwillingness to relocate for academic appointments. Drawing upon data obtained from 738 law school professors who began tenure-track appointments between the fall of 1986 and spring of 1991, the Authors of this Article demonstrate that neither family ties nor geographic constraints fully explain women's failure to attain the most prestigious law school positions. In addition, they show that family ties and mobility restraints often are associated with positive career outcomes for men . . . . These findings suggest that the glass ceiling in academia is not simply a meld of family commitments and geographic limits. Instead, the effects of gender, family ties, and mobility constraints on law school hiring are far more complex than previously thought.<sup>120</sup>

In addition, Professor Carrington argues that there is no necessary relationship between the ethnic makeup of faculty and the ability to be role models and sensitive to issues of perspective. This rejection of the notion of role modeling has been extensively discussed by women of

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119. Deborah J. Merritt & Barbara F. Reskin, *The Double Minority: Empirical Evidence of a Double Standard in Law School Hiring of Minority Women*, 65 S. CAL. L. REV. 2299, 2344-57 (1992).

120. Deborah J. Merritt, Barbara F. Reskin, & Michelle Fondell, *Family, Place, and Career: The Gender Paradox in Law School Hiring*, 1993 WIS. L. REV. 395, 375 (1993) (emphasis added).

color,<sup>121</sup> but I hear them arguing that the imposition of role modeling is inappropriate. It is still true that scholars of color are interested in mentoring students, black and white, and that a faculty that is all white is making a statement about what it believes is important.

The last question indicates why this issue has come up now. Professor Carrington's history has a kind of "Revenge of the Old Boys" quality to it. In a number of places the old boys' network seems to be making efforts to raise issues about the nature of the employment process and the decisions we make in a number of situations. The heart of the argument is that in the old golden days we had a neutral system of hiring or selecting students and creating curriculum, and that that neutral system has been corrupted by questions about the sexual and racial impact of the decisions. This nostalgia for a past that did not exist and still does not exist seems imbedded in the logic of his choices. The movement for this view, significantly led by groups like the National Association of Scholars, wants to define scholars of color and women who argue against current assumptions in a certain way and then criticize them.<sup>122</sup> Their definitions are skewed toward some vision of the present that is not the present I live in.<sup>123</sup> If anything, affirmative action has required us, the elite law schools, to look more carefully at candidates and to throw our net more broadly. To ask us to go back to some past where blacks and women were explicitly excluded both directly and indirectly will not do. We see this in the effort at a number of law schools to change criteria or alter the number of votes it takes to make appointments or recommend tenure. I have not had the opportunity to do a complete history of such rules, but it looks like the possibility of trying to hire more women and scholars of color to faculty has helped to spur those proposed changes.<sup>124</sup> It is possible to see

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121. See generally 6 BERKELEY WOMEN'S L.J. *passim* (1991) (symposium issue discussing black women law professors).

122. See generally Culp, *supra* note 12.

123. They also do not seem to want to debate these issues. When six of my senior colleagues were founding members of the Duke Association of Scholars, I asked them to debate why they felt the need to join such an organization given the anti-minority, anti-women, anti-homosexual argument that seems to undergird the national group. None of my colleagues responded to my note except for Paul Carrington, who said he did not really have anything to discuss. It is perhaps not strange that despite my having sent Professor Carrington four letters about drafts of his article, he did not acknowledge me or respond to even the printed criticism I have made of his arguments about the history of American law schools. It seems to me that this is a kind of master mode in which senior white scholars want scholars of color to accept without debate their views on these subjects.

124. This has certainly been true at Duke Law School, where a number of proposed changes

this desire to remain master in the law schools in Professor Carrington's discussion of the Clare Dalton matter at Harvard. His description of Derrick Bell's strike as different from that of Martin Luther King because "[h]is action was simply an attempt to impose the views of a dissenter on those of a majority" is just wrong. A majority on Harvard's faculty voted to urge Professor Dalton's tenure; it was a minority given power by recent changes in the rule for tenure that permitted a minority to force their will on the majority.<sup>125</sup>

Perhaps more importantly, Professor Carrington misunderstands the moral and political legacy of Martin Luther King, Jr. Nothing in Martin Luther King's actions or words assumes that the majority have a right to impose unjust and immoral actions on a minority. This is evident in his *Letter From A Birmingham Jail*, where Dr. King made clear that it was in fact the will of an unjust majority that must be overcome.<sup>126</sup>

The claim of victimhood of white law professors can be seen in Professor Carrington's claim that scholars of color have made the essentialist claim that "white males are not qualified to vote on the tenure of a female of color."<sup>127</sup> He cites no one for this proposition, and there is a very good reason: there is no one who makes the claim in exactly that way. Indeed, it is not what I hear scholars of color claiming. Faculty often defer to the judgment of other faculty when they do not have expertise. I have seen a reluctance on the part of some white male faculty to defer on issues involving scholars of color when scholars of color and other scholars have more expertise. When it comes to issues of race, it seems that all white professors are as qualified as people who have actually read and thought about some of these issues. The charge of essentialism is meant to gain intellectual protec-

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in our tenure rules have been offered after efforts to hire black faculty failed. One interpretation of these proposals is a desire on the part of the faculty to avoid discussing "problematic" candidates of color by making their appointment obviously impossible.

125. Alice Dembner, *MCAD Leans on Harvard in Gender Bias Case*, BOSTON GLOBE, July 28, 1993, at 13 (a majority of Harvard Law faculty voted to grant tenure to Dalton, but she was short of the two-thirds majority required. Derek Bok, who was then president, established an outside panel to review her work. That panel decided not to grant her tenure.).

126. MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 80-81 (1964).

*We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed. Frankly, I have never yet engaged in a direct-action campaign that was "well timed" in the view of those who have not suffered unduly from the disease of segregation. For years now I have heard the word "Wait!" It rings in the ear of every Negro with piercing familiarity. This "Wait" has almost always meant "Never."*

*Id.* at 82-83 (emphasis added).

127. Carrington, *supra* note 13, at 1145.

tion for this reluctance to defer.

All that is required of law schools in their hiring to meet the challenge asked of them by several presidents of the AALS, and some of their faculty, is that they make an effort to reflect the true diversity of skills and perspectives that exist in the community. Law schools that are essentially all male or all white fail that task. Such efforts are clearly and always consistent with high quality teaching and scholarship. If we do not raise that issue even in places where some change has taken place, the systematic issue of racism will not go away.

There has been movement but little change in the country clubs of America in the wake of the Shoal Creek fiasco. Many of America's country clubs remain all white enclaves with no or only token black membership.<sup>128</sup> What happened at the Shoal Creek Country Club, where there "have been no serious aftereffects from last year's controversy," is what has happened in many American law schools.<sup>129</sup> "It's had no effect on the club," [new club president] Rast said. "The members don't feel any differently. They didn't fight it, we've had no resignations and no more applications than before. We have one black member, and no other applications from blacks."<sup>130</sup> This same description could be applied to American legal education. We have made a few African-Americans—"honorary whites," "tokens"—members of the legal academy, but this fact has had little impact on the reality of the almost all white life in the legal academy. It too has gone on with little protest or change from a still almost all white legal academy.

#### V. CONCLUSION: BEYOND GUILT

When a racist act is pointed out, many white people believe that the response being demanded is guilt. If you accuse someone of a racist action or of helping to enforce white supremacy, they say you are requiring them to take on the guilt of all white people with respect to our racist past. The point I have tried to make in my work is that the system of racial oppression is supported by almost all of us, and that change will require effort on the part of all of us.<sup>131</sup> Black people, even when they are accused of being in support of white supremacy, do

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128. See generally Leonard Shapiro & Tony Reid, *Shoal Creek: A Wave, Then a Trickle: A Year Later, Golf Struggles with Race*, WASHINGTON POST, Aug. 1991, at D1.

129. *Id.* at D3.

130. *Id.*

131. See generally Jerome McCristal Culp, Jr., *Notes from California: Rodney King and the Race Question*, 70 DEN. U.L. REV. 199 (1993).

not react in this way. They may be defensive, but they do not feel guilty. This is because most of us believe that white supremacy is mainly the responsibility of white actors.<sup>132</sup> However, I do not believe that guilt is generally a useful response, even if that assumption is correct. Indeed, the response of the guilty white liberal sounds very much like the responses of Paul Carrington and Senator Danforth. They believe somehow that their ability to prove that they have shown good will make any particular bad action all right. What is required to fight racial oppression is not guilt but action. If people would respond to arguments about racism by listening to the complainant and dealing with the complaint, then it would be possible for white people not to be guilty and to help eliminate those vestiges of racism. If we continue to deny the reality of the racial status quo that confronts us, we are likely to repeat the history of the first reconstruction while we wait for nonexistent market forces and private and state forces of goodwill to effectuate change. I would like Paul Carrington, Senator Danforth, the jurors at the first trial of those who beat Rodney King, the Supreme Court and Judges Davies and Posner to have a better understanding of our racial history and the racial present it has produced, but I want them all to respond to that history with action and not guilt or recrimination.

#### EPILOGUE

Yet [four of the jurors who voted not to convict the police officers who beat Rodney King] all stand by their verdicts. "If [people] will condemn these verdicts, maybe we should just open the prison doors and let all those people out," says Sokoski, [one of the jurors]. "Because if this is wrong . . . then you have to condemn the whole system."<sup>133</sup>

When I was a boy my father managed one of the little league teams in our home town. Though he did not get to manage me, he managed the teams of my four younger brothers. My oldest brother, the one who eventually went to an Ivy League school, was an excellent athlete. He led the little league in all offensive categories and was the best pitcher in the league during his last year. At the awards banquet

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132. Whites sometimes do point out, for example, that black Africans participated in the enslaving of other black Africans for shipment to the New World. However, such claims are usually obfuscating efforts and not the main point of these scholars' work.

133. D.M. Osborne, *Reaching for Doubt*, THE AMERICAN LAWYER, Sept. 1992, at 62, 69.

when the time came for the presentation of the Most Valuable Player Award, it went not to my well-deserving brother, but to the very mediocre (as a baseball player) son of one of the other coaches, all of whom were white. After the banquet it became known that the coaches (including my father) had voted to change the selection criteria for the awards so that no one player got all of the trophies. I can still remember the grin on the face of the winner as he carried his trophy, the largest one given, out the door of the banquet hall, and the look of bewilderment that was on my brother's face.

My father never discussed this situation with me or my brother or our other siblings. He did not look unhappy at the banquet for my brother, but he stopped coaching Little League teams after his last son aged out of eligibility. I have often thought of how my father must have felt to have to be part of that injustice done to his son, and I thought as I have grown up that I would never do the same thing. Racial progress in America meant at a minimum that one could say that something was racist and that it injured black people because of race. I would speak up when I thought wrongs had been committed. As an older if not wiser person, I have found that it is more difficult to raise issues of racial unfairness, even in legal settings. People do not like to hear of it,<sup>134</sup> and, when they do hear of it, they demand that you consider every conceivable alternative, and some not so conceivable, before they will admit there is a problem.<sup>135</sup> Even then, if the cost is too great, they will say that it is just too bad.<sup>136</sup> But I have a hard time simply accepting all that my father had to accept. Speaking up is difficult. It seems unappreciative of the good things that people have done, but in a world with lots of racial injustice it seems to me

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134. The jurors who acquitted the officers who beat Rodney King discussed some of the racism in the officers' actions:

The same split occurred over another computer message sent 20 minutes before the beating [of Rodney King] in which Powell described a black family dispute as "right out of 'Gorillas in the Mist.'" The four jurors who ended up voting for conviction all felt it was a racial slur that revealed . . . [Officer Powell's] frame of mind. "But some said, '*He just said that, it was no big deal*'" one juror related.

Bernstein, *supra* note 3, at 33 (emphasis added).

Loya [the lone hispanic juror] . . . challenged a juror who suggested that King deserved what he got. "That was a poor choice of words," the usually withdrawn, deeply religious woman replied. "Nobody deserves to be beaten."

*Id.* at 19.

135. See *St Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993).

136. See *McCleskey v. Kemp*, 481 U.S. 279 (1987).



necessary and occasionally very, very important to look racism in the face and call its name.

